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THE MISUSE OF RULE 404(B) ON THE ISSUE OF INTENT IN THE FEDERAL COURTS

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I. INTRODUCTION

As every Evidence law student knows, Federal Rule of Evidence 404 forbids the prosecution from offering evidence of the defendant's bad acts or traits of bad character as substantive evidence for the purpose of showing the defendant's propensity to commit such acts or to show that he is a person of poor general or specific character.[1] Further, the fact finder is forbidden to infer that simply because the defendant has acted badly on an earlier occasion, he committed a similar

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1. FED. R. EVID. 404, which provides the following:

(a) Character evidence generally.—Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
  (1) Character of accused.—In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
  (2) Character of alleged victim.—In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
  (3) Character of witness.—Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts.—Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action 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, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Note that state analogues come in various forms, including rules, codes, and common law.

bad act on the occasion that led to his criminal charge in the case at bar.[2] To put it another way, it is a fundament of American law that defendants should be judged for what they have done in the case at issue rather than for what they have done in the past or for their general character.[3]

Professor Edward J. Imwinkelried captured the general rule and the underlying dangers when he wrote:

> The character evidence prohibition is a settled fixture of the common law of evidence. With some exceptions, there is a general prohibition against treating a person's character or character trait as circumstantial proof of his or her conduct. If a proponent were permitted to use this theory of logical relevance, two significant probative dangers would arise. To begin with, if the jury focused on the question of the type or kind of person a litigant is, the jurors might be inclined to decide the case on an improper basis—the danger that Bentham termed "misdecision."[4] Thus, if the jury learned that a defendant had committed a long list of violent crimes, at least subconsciously the jurors could be tempted to find him guilty—and thereby protect the public from him—even if he was not guilty of the charged crime.[5]

Beyond this basic prohibition, it is equally universally recognized in American law and, specifically, in Federal Rule of Evidence 404(b) (and its state law counterparts) that the prosecution is free to offer other (usually prior in time to the event charged at trial) uncharged (in the present case) acts of the defendant that happen to reflect badly on his character, where, despite the fear of the forbidden propensity inference, such evidence is offered for some other, relevant, non-propensity purpose.[6] This uncharged misconduct may be offered in the form of arrests, convictions, or even acts that have never been the subject of a criminal charge.

It is the offer of other similar acts committed by the defendant in order to show his *intent* in the case at bar that has proved the most troublesome application of Rule 404(b) other acts evidence for two rea-

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

3. Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 581 (1990).

4. 6 JEREMY BENTHAM, THE WORKS OF JEREMY BENTHAM 105-09 (John Bowring ed., 1962) (1843).

5. Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 Sw. U. L. REV. 741, 741-42 (2008).

6. *See* FED. R. EVID. 404(b) (noting motive, identity, absence of mistake, and intent as permissible uses for such evidence).

sons.[7] First, inferring intent in the present case from a similar act in a different situation, which perhaps happened decades before, is highly questionable as a matter of both human personality analysis and simple logic.[8] Indeed, it could be argued (though not here) that such an inference is so attenuated that it violates the constitutional proscription on impermissible inferences fact finders may make in finding a defendant guilty on all elements of the crime beyond a reasonable doubt.[9] Second, though all offers of prior act evidence under Rule 404(b) create the potential for prejudicial misuse by the jury, the offer of the *same* or a *similar act* to the one charged at trial presents the greatest prejudice because it makes the propensity inference almost inescapable.[10]

Where other acts evidence is offered on most elements of the charged offense other than intent, the evidence may routinely be necessary and probative without being unduly prejudicial. For example, where the defendant claims he was not in the neighborhood where a murder was committed, the government's offer that he had in fact committed an unrelated burglary in that neighborhood at around the same time as the murder would be relevant and not overly prejudicial.[11] Specifically, it would allow the jury to know both that the accused was in fact in the neighborhood and is a burglar, but it does not

7. *See, e.g.*, Imwinkelried, *supra* note 3, at 577 (noting Rule 404(b) has generated more published opinions than any other subsection of the Federal Rules of Evidence).

8. *See id.* at 584 (arguing that even if the accused possessed a certain intent in a similar prior incident that individual may not possess the same intent in a new similar incident based on a "variable mental component"); *see also* H. Richard Uviller, *Evidence of Character to Prove Conduct; Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 879 (1982) (questioning whether it makes logical sense to "admit evidence of a previous knife fight to show the defendant's *motive* to commit the assault in issue (a relevant but not elemental fact), but not the *commission* of the assault").

9. *See* Robinson v. California, 370 U.S. 660, 665-66 (1962) (describing how the jury was instructed that it could consider the defendant's past condition of being addicted to narcotics in the present case and how this could result in a constitutional violation); *see also* Imwinkelried, *supra* note 5, at 741-42 (explaining how jurors may subconsciously convict an accused on the basis of prior crimes, thus resulting in a constitutional violation). This concern is especially apparent given that a court need not find that a defendant committed an extrinsic act beyond a reasonable doubt for evidence of that act to be admissible. United States v. Beechum, 582 F.2d 898, 913 (5th Cir. 1978) (en banc).

10. *See, e.g.*, United States v. Smith, 283 F.2d 760, 763 (2d Cir. 1960) (stating evidence of particularly similar prior acts is inadmissible because "it unduly confuses the decision of the issue on which the case must finally turn, and makes it likely that the jury may substitute the general moral obliquity of the accused"); *see also* Imwinkelried, *supra* note 3, at 584 ("The reliance on an assumption about a person's propensity or tendency to form the same intent creates the possibility that the jury will overvalue the uncharged misconduct evidence."). Additionally, the requisite court instruction against propensity inference reasoning is often ineffective. *See* discussion *infra*.

11. *See* Uviller, *supra* note 8, at 879 (describing a similar line of reasoning in which a jewelry merchant was on trial for buying and receiving stolen gems; his prior purchase of stolen diamonds at a discounted price would be admissible to show his knowledge

lead them to inevitably believe that he is a murderer.[12] By contrast, offering an earlier unrelated murder by the defendant who is now charged with murder to show "his intent to murder" in the case at bar is logically and scientifically irrelevant to show such intent.[13] Additionally it is logically indistinguishable from showing a propensity to murder (a forbidden evidentiary purpose), which social scientists have shown creates unfair prejudice in the jurors' minds, which no limiting instruction can cure (if not reinforce).[14] As one writer has put it,

> Courts even go as far as to repeatedly generalize that evidence of "the use of prior drug involvement to show . . . intent in a drug trafficking offense is appropriate." Despite the courts' repetition of this principle, it is fatally flawed; its application almost always violates Rule 404(b). What chain of reasoning can link the prior drug history . . . to the charged crime other than one that infers that the defendant has a drug-related propensity, and that based on this propensity, the jury can disbelieve him when he denies criminal intent as to the latest drug incident? There is no propensity-free chain. The earlier drug use, which is behavioral evidence, can be relevant only if we assume that the defendant's behavior forms an unchanging pattern. In the words of Rule 404(b), the drug history is relevant only because it "prove[s] the character of" the defendant and supports the inference that, in the case at issue, the defendant acted consistent [sic] with that character.[15]

Indeed, the same is true in the civil context. As Lisa Marshall has pointed out in the context of Title VII cases:

> In short, then, when plaintiffs purport to offer evidence of an employer's "motive," they overwhelmingly do so based on the

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that the stones were stolen on the second occasion but not to show that he bought the stones in the instance in question).

12. *See id.* at 879 (questioning whether the highly theoretical separation of intent and action may result in jury confusion.); *see also* Lisa Marshall, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 YALE L.J. 1063, 1091 (2005) ("[T]here is little reason to think that the safeguards available to the district court (namely, the possibility of limiting instructions) could ever ensure that the jury would or even could separate these two inquiries in the contrived manner demanded by the court.").

13. *See* Uviller, *supra* note 8, at 879 (questioning whether prior acts are relevant to show intent in a subsequent crime). *But see* Edward J. Imwinkelried, *An Evidentiary Paradox, Defending the Character Evidence Prohibition by Upholding Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 423 (2006) (highlighting cases in which a person is involved in such a suspicious set of circumstances that it is "objectively unlikely" that these situations would arise over and over again randomly, thus opening the door to admission under the objective chances theory).

14. *See* discussion *infra*.

15. Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 191-92 (1998).

> following logic: The employer's prior acts reveal that the employer has some discriminatory mindset; ipso facto, the employer was motivated to discriminate [by that mindset in taking the adverse action]. Nothing more than semantics differentiates this "motive" from character propensity, while the underlying theory of admissibility in no manner complies with Rule 404(b)'s prohibition of prior act evidence "to prove the character of a person in order to show action in conformity therewith."[16]

Historically, the interplay of Rules 404(a), 404(b), and 403[17] created a rather exclusionary view of the admission of Rule 404(b) evidence, including on the issue of intent.[18] In the last fifteen to twenty years, however, many federal courts have reversed their views and now generally take a welcoming or inclusionary approach to admission of prior similar acts for the purpose of showing intent.[19] Even more alarming, one federal circuit has taken an extreme view and determined that in cases where the issue of the defendant's intent is not contested, the government is entitled to offer evidence of other similar crimes to prove the general intent of the defendant.[20] A number of other federal circuits have taken a slightly less extreme but equally unjustifiable view, favoring admission of similar acts evidence where the defendant enters a not guilty plea to an indictment charging a specific intent crime. These courts rest this admission on the theory that the entry of a plea of not guilty per se, "places the defendant's

16. Marshall, *supra* note 12, at 1076.

17. *See* FED. R. EVID. 403 (giving courts discretion to exclude even relevant evidence if it is unfairly prejudicial).

18. *See* United States v. Williams, 577 F.2d 188, 191 (2d Cir. 1978) ("[O]ther crimes evidence is inadmissible to prove intent when that issue is not really in dispute."); *see also* United States v. Yeagin, 927 F. 2d 798, 803 (5th Cir. 1991) ("Other crimes evidence is not admissible merely because the government manages on appeal to identify some broad notion of intent lurking behind the element of possession."); United States v. DeCicco, 435 F.2d 478, 483 (2d Cir. 1970) ("Evidence of prior crimes is customarily not admissible to show the disposition, propensity or proclivity of an accused to commit the crime charged.").

19. *See* United States v. Pascarella, 84 F.3d 61, 69 (2d Cir. 1996) ("This court follows the 'inclusionary' approach to 'other crimes, wrongs, or acts' evidence, under which such evidence is admissible unless it is introduced for the sole purpose of showing the defendant's bad character . . . ."); *see also* United States v. Ponce, 8 F.3d 989, 993 (5th Cir. 1993) (finding evidence of defendant's prior conviction admissible due to a lack of clarity in defense counsel's proposed stipulation on the issue of intent).

20. *See* United States v. Crowder, 141 F.3d 1202, 1209 (D.C. Cir. 1998) (en banc) ("[A] defendant's offer to stipulate to an element of an offense does not render the government's other crimes evidence inadmissible under Rule 404(b) to prove that element, even if the defendant's proposed stipulation is unequivocal, and even if the defendant agrees to a jury instruction of the sort mentioned in our earlier opinion."); *see also* United States v. Williams, 238 F.3d 871, 876 (7th Cir. 2001) ("[A] defendant's offer to stipulate to an element of an offense does not render inadmissible the prosecution's evidence of prior crimes to prove elements such as knowledge and intent.").

intent in issue" and permits the government to present evidence of every similar crime with which the defendant has been convicted or even merely charged.[21]

This Article argues that too many federal courts have ignored the cogent teaching of both the majority and dissenting opinions in the seminal case of *United States v. Beechum*,[22] social science, Rule 403, the implications of the United States Supreme Court's opinion in *Old Chief v. United States*,[23] and common sense, in the name of simply easing the government's burden in proving criminal cases. I argue for a common sense approach to the application of Rule 404(b) on the issue of intent, which balances the government's legitimate need to prove its case, particularly in the absence of other evidence of contested intent, and the defendant's right to a fair trial untainted by barely veiled and highly prejudicial evidence of propensity.

II. HOW RULE 404 OPERATES

Federal Rule of Evidence 404(b) provides that in criminal cases, evidence of other acts or crimes (uncharged in the present case) attributed to the defendant are inadmissible when offered to show only that the defendant acted in conformity with the character traits suggested by the uncharged acts.[24] More simply put, the government is forbidden to offer prior bad acts to show that because the defendant committed those acts in the past, he is more likely to have committed them at the time of the charged offense.[25]

Though the first sentence of Rule 404(b) bluntly bars the offer of other acts to show the defendant's propensity to commit such acts, the second sentence of Rule 404(b) clearly permits the government to offer evidence of such acts despite the presence of the inevitable propensity inference.[26] According to the Rule, prior acts evidence is admissible where the government can articulate a relevant, non-propensity purpose for the evidence.[27] Thus, the Rule contemplates that in some cir-

21. *See* United States v. Gardner, 313 F. App'x 668, 670 (4th Cir. 2009) ("A not-guilty plea places a defendant's intent at issue, and evidence of similar prior crimes can therefore be relevant to prove intent to commit the crime charged."); *see also* United States v. Sanchez, 118 F.3d 192, 196 (4th Cir. 1997) ("A not-guilty plea puts one's intent at issue and thereby makes relevant evidence of similar prior crimes when that evidence proves criminal intent.").

22. 582 F.2d 898 (5th Cir. 1978)

23. 519 U.S. 172 (1997).

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

25. *Id.* For example, in a kidnapping prosecution, Rule 404(b) forbids the government from offering other acts of kidnapping by the defendant for the purpose of inferring that because he kidnapped in the past, he has likely kidnapped again.

26. *Id.*

27. *See id.* (allowing such evidence where it is offered to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident").

cumstances courts may admit other acts evidence despite the impermissible propensity inference danger that accompanies such admission.[28] In short, the Rule permits the government to offer propensity evidence if it has another relevant purpose, all regulated by the balancing test of Rule 403.[29]

This 404-403 structure invites some obvious practical solutions. Where, for example, the issue on which the government offers the other acts evidence would help prove a required element of the government's case (other than intent), the issue is contested, and no other effective way to prove the element exists, the court should likely admit the other acts evidence.[30] Conversely, in my view, where the government seeks to offer other acts evidence on an undisputed matter where there is substantial other evidence on point, the court could not likely admit such evidence without abusing its discretion, given the generally accepted overwhelming prejudice of admitting other bad acts evidence, particularly where the prior acts are similar to the acts charged.[31] Between these two extremes, the wide variance and vagueness in treatment by the courts leads to unpredictability and a lack of fairness.[32]

A. *UNITED STATES V. BEECHUM*

Any discussion of the modern treatment of Rule 404(b) by the federal courts must begin by exploring *United States v. Beechum*,[33] an influential and thoughtful decision from the United States Court of Appeals for the Fifth Circuit. In *Beechum*, Judge Gerald Tjoflat, writing for the majority of the en banc Fifth Circuit, provided the first outline of the modern (i.e. post adoption of the Federal Rules of Evidence) judicial view of the admission of other acts evidence, overturn-

28. *Id.*

29. *See, e.g.*, United States v. Colon, 880 F.2d 650, 656 (2d Cir. 1989) (describing how to be admissible prior act evidence must be relevant to a non-propensity purpose and must satisfy the probative-prejudice balancing test of Rule 403).

30. *See* United States v. Lawrance, 480 F.2d 688, 691 n.6 (5th Cir. 1973) (noting that a strong government case on the issue of intent will minimize the necessity of admitting extrinsic evidence); *see also* United States v. Kirk, 528 F.2d 1057, 1060-61 (5th Cir. 1976) (describing that if the defendant does not contest the issue of intent, then the prejudicial effect of extrinsic evidence on the issue often outweighs its probative value).

31. *See, e.g.*, United States v. Merriweather, 78 F.3d 1070, 1077 (6th Cir. 1996) (describing why in the face of other available evidence the admission of prior acts evidence would be highly prejudicial).

32. *See* Marshall, *supra* note 12, at 1092 ("[T]he unarticulated exception to the propensity ban leaves courts confused over its outer boundaries . . . .").

33. 582 F.2d 898 (5th Cir. 1978).

ing *United States v. Broadway*,[34] the pre- Federal Rules of Evidence precedent.[35] The facts of *Beechum* follow.

Orange Jell Beechum was a substitute letter carrier in South Dallas, Texas for several years before his arrest on September 16, 1975.[36] Postal inspectors suspected that he was "rifling the mail" so they placed a letter containing a silver dollar, a greeting card, and sixteen dollars cash in a mailbox on his route.[37] They treated the currency with a powder that was visible only under ultraviolet light, presumably to catch Beechum red-handed.[38] Subsequently, a postal inspector watched Beechum take the letter from the mailbox, spend an hour in a record shop, return to the Post Office, and then attempt to leave.[39] Authorities discovered that Beechum had turned in the planted letter, which had been opened and resealed, with the silver dollar and currency missing.[40] Due to this violation, an inspector apprehended Beechum as he was leaving the Post Office, informed him of the planted letter and its missing contents, read him his Miranda rights, and asked him to empty his pockets.[41] While frisking Beechum the inspector discovered the silver dollar as well as two Sears credit cards.[42] At first, Beechum claimed to possess only his own credit cards, but when he was shown the Sears cards, he claimed he had never used them.[43]

Beechum was indicted on a single count of knowingly and unlawfully possessing an item stolen from the mail, the silver dollar.[44] The trial court overruled defense counsel's motion in limine that attempted to exclude any evidence concerning the Sears credit cards and found the cards relevant to the main contested issue in the case—intent.[45] At trial, the government introduced evidence concerning the Sears cards during its case-in-chief, including evidence that the cards were issued to individuals on Beechum's mail route.[46] Beechum took the stand in his own defense, claiming that the silver dollar fell out of the mailbox, that he put it in his pocket, that he intended to turn it in to his supervisor, and that he was not leaving the Post Office when he

34. 477 F. 2d 991 (5th Cir. 1973), *overruled by* United States v. Lemaire, 712 F.2d 944 (5th Cir. 1983).
35. United States v. Beechum, 582 F.2d 898 (5th Cir. 1978) (en banc).
36. *Beechum*, 582 F.2d at 903.
37. *Id.*
38. *Id.* at 903-04.
39. *Id.* at 904.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 903-04.
45. *Id.* at 904.
46. *Id.*

was arrested.[47] Although Beechum made no mention of the Sears credit cards on direct, the prosecutor attempted to question Beechum about them on cross-examination.[48] This caused Beechum to repeatedly invoke his Fifth Amendment rights and defense counsel to repeatedly object.[49] In the end, a jury convicted Beechum.[50] On appeal, the initial three-judge panel reversed Beechum's conviction ruling the admission of the uncharged credit card theft was reversible error.[51] The Fifth Circuit then decided to re-hear the appeal en banc.[52]

The Fifth Circuit, sitting en banc, first analyzed the issues related to the cross-examination.[53] The first issue was whether the prosecutor's attempted cross-examination concerning the Sears credit cards went beyond the scope of direct because Beechum did not mention the cards.[54] The court held that this questioning was not beyond the scope of direct because Beechum had *testified on direct, essentially, that he lacked the intent to unlawfully possess the silver dollar.*[55] By so testifying, the court reasoned that he opened the door to questioning concerning the Sears credit cards because if it could be established that he wrongfully possessed the cards, it would be less likely that he had lawful intent in possessing the silver dollar.[56] The court also that found that Beechum's repeated invocation of his Fifth Amendment rights in response to questions on cross-examination did not result in undue prejudice.[57]

The Fifth Circuit then moved on to what it saw as the most critical issue, whether the Sears credit cards were properly admitted as extrinsic offense evidence under Rule 404(b).[58] The Fifth Circuit's panel opinion had held that the cards and related evidence were inadmissible under the standard established for such evidence in *Broadway*.[59] According to the *Beechum* court, the *Broadway* test required (1) "that the physical elements of the extrinsic offense include the es-

47. *Id.* at 905.
48. *Id.*
49. *Id.*
50. *Id.* at 903.
51. United States v. Beechum, 555 F.2d 487, 504-08 (5th Cir. 1977), *vacated en banc*, 582 F.2d 898 (5th Cir. 1978).
52. *Beechum*, 582 F.2d at 902-03.
53. *Id.* at 906-07.
54. *Id.* at 907.
55. *Id.* at 906 (emphasis added).
56. *Id.* at 907.
57. *See id.* at 907-09 (holding the trial court incorrectly allowed Beechum to claim the protections of the Fifth Amendment because he waived those rights by taking the stand and testifying he did not have unlawful intent and concluding it could not have been unduly prejudicial for Beechum to have to repeatedly invoke his Fifth Amendment rights because he should not have been allowed to invoke them at all).
58. *Id.* at 909.
59. *Id.* at 910.

sential physical elements of the offense for which the defendant was indicted"[60] and (2) "that each of the physical elements of the extrinsic offense be established by plain, clear, and convincing evidence."[61] The panel opinion held that the prosecution had failed to establish that the Sears cards were stolen from the mail, one of the necessary physical elements.[62] Thus, the cards were not admissible under *Broadway*'s "clear and convincing" standard.[63]

The majority of the en banc Fifth Circuit reversed and overruled *Broadway*, finding that "a straightforward application of the Federal Rules of Evidence calls for admission of the cards."[64] The court reasoned that as a predicate to determining whether extrinsic offense evidence is relevant, the prosecution must offer proof that is sufficient under Rule 104(b) for the trial judge to rule that a jury reasonably could find that the defendant committed the extrinsic offense by a preponderance of the evidence.[65]

Having lowered the standard of proof, the Fifth Circuit established a two-step test for the admission of 404(b) evidence.[66] For admission under 404(b): (1) the "extrinsic offense evidence [must be] relevant [pursuant to Federal Rule of Evidence 401] to an issue other than the defendant's character" and (2) must survive the Rule 403 test weighing probative value versus undue prejudice.[67] On the first

60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 912-13. This view of Rules 404(b) and 104(b) was later endorsed by the United States Supreme Court in *United States v. Huddleston*, 485 U.S. 681, 689-90 (1988).
66. *Id.* at 911.
67. *Id.* Other courts generally follow this test, though some add a third step. *See, e.g.*, United States v. Ragland, 555 F.3d 706, 714 (8th Cir. 2009) (quoting United States v. Davis, 457 F.3d 817, 823 (8th Cir. 2006)) ("Evidence of prior bad acts is admissible if it is: '(1) relevant to a material issue; (2) similar in kind and close in time to the crime charged; (3) supported by sufficient evidence to support a finding by a jury that the defendant committed the other act; and (4) if the potential prejudice does not substantially outweigh the probative value of the evidence.'"); United States v. Parker, 553 F.3d 1309, 1313-14 (10th Cir. 2009) ("[W]e consider four factors: (1) whether the evidence is offered for a proper purpose, (2) whether the evidence is relevant, (3) whether the probative value of the evidence is substantially outweighed by its prejudicial effect, and (4) whether a limiting instruction is given if the defendant so requests."); United States v. Millbrook, 553 F.3d 1057, 1062 (7th Cir. 2009), *overruled on other grounds by* United States v. Corner, 598 F.3d 411 (7th Cir. 2010) ("[T]he evidence of a prior conviction or bad act must meet the following criteria: (1) it must be directed toward establishing a matter in issue other than the defendant's propensity to commit the crime charged; (2) it must be similar enough and close enough in time to be relevant to the matter in issue; (3) it must be sufficient to support a jury finding that the defendant committed the similar act; and (4) its probative value must not be substantially outweighed by the danger of unfair prejudice."); United States v. Cherer, 513 F.3d 1150, 1157 (9th Cir. 2008) (internal quotation marks omitted) ("[E]vidence may be admitted pursuant to

prong of this test, according to the majority, the basic test for relevance on intent under Rule 401 is the degree of similarity between the extrinsic offense and the charged offense.[68] The required similarity will depend on the issue the extrinsic evidence is being offered to prove.[69] Specifically, the Fifth Circuit reasoned that "where the issue addressed is the defendant's intent to commit the offense charged the relevancy of the extrinsic offense derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses."[70] This is so, according to the court, because proof that the defendant had unlawful intent in committing the extrinsic offense makes it less likely that he had lawful intent in committing the charged offense.[71] In sum, the court noted that "once

404(b) if (1) the evidence tends to prove a material point; (2) the other act is not too remote in time; (3) the evidence is sufficient to support a finding that defendant committed the other act; and (4) (in certain cases) the act is similar to the offense charged."); United States v. Rayborn, 495 F.3d 328, 342 (6th Cir. 2007) (mandating (1) there must be sufficient evidence that the prior act occurred, (2) the evidence must be admitted for a legitimate purpose, and (3) the probative value of the evidence must not be outweighed by unfair prejudice); United States v. Douglas, 482 F.3d 591, 596 (D.C. Cir. 2007) (alteration in original) (quoting United States v. Bowie, 232 F.3d 923, 930 (D.C. Cir. 2000)) ("[A] Rule 404(b) objection will not be sustained if: 1) the evidence of other crimes or acts is relevant in that it has '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;' 2) the fact of consequence to which the evidence is directed relates to a matter in issue other than the defendant's character or propensity to commit crime; and 3) the evidence is sufficient to support a jury finding that the defendant committed the other crime or act."); United States v. Edwards, 342 F.3d 168, 176 (2d Cir. 2003) (following an "inclusionary" four-step analysis in which the court considers "whether: (1) it was offered for a proper purpose; (2) it was relevant to a disputed trial issue; (3) its probative value is substantially outweighed by its possible prejudice; and (4) the trial court administered an appropriate limiting instruction"); United States v. Sampson, 980 F.2d 883, 886 (3d Cir. 1992) (following a test, based on the Supreme Court's opinion in *Huddleston*, requiring: "(1) the evidence must have a proper purpose under Rule 404(b); (2) it must be relevant under Rule 402; (3) its probative value must outweigh its prejudicial effect under Rule 403; and (4) the court must charge the jury to consider the evidence only for the limited purpose for which it is admitted"); United States v. Lynn, 856 F.2d 430, 434-35 (1st Cir. 1988) (requiring that (1) the evidence must have "special" relevance, meaning it is "offered to establish some material issue, such as intent or knowledge" and is not solely offered for propensity purposes and (2) must pass the Rule 403 probative value versus unfair prejudice balancing); United States v. Rawle, 845 F.2d 1244, 1247 (4th Cir. 1988) (footnotes omitted) (following a three-part or four-part test, depending on the case, requiring evidence be "(1) relevant to an issue other than character, (2) necessary, and (3) reliable"); United States v. Holman, 680 F.2d 1340, 1348-50 (11th Cir. 1982) (requiring either a two or three factor test similar to the *Beechum* two-part test); *Beechum*, 582 F.2d at 911 (outlining that (1) the extrinsic offense evidence must be relevant to an issue other than the defendant's character and (2) the evidence must possess probative value that is not substantially outweighed by its undue prejudice and must meet the other requirements of rule 403).

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

69. *Id.* at 911.

70. *Id.*

71. *Id.*

it is determined that the extrinsic offense requires the same intent as the charged offense and that the jury could find that the defendant committed the extrinsic offense, the evidence satisfies the first step under rule 404(b)."[72] Additionally, according to the court, "the extrinsic offense is relevant (assuming the jury finds the defendant to have committed it) to an issue other than propensity because it lessens the likelihood that the defendant committed the charged offense with innocent intent."[73]

The Fifth Circuit majority continued its discussion of propensity issues as it laid out guidelines for determining whether the second step of the test (the Rule 403 analysis) had been satisfied.[74] The court noted the danger that a jury may rely on admitted extrinsic evidence to convict a defendant on his bad character instead of focusing on the offense charged.[75] This risk is precisely the reason that extrinsic offense evidence is excluded when it is only relevant to the defendant's character or propensity to commit crimes.[76] Thus, to minimize this potential unfairness to the defendant, in applying the Rule 403 balancing test the court stated that courts must make a commonsense assessment of the circumstances surrounding the extrinsic evidence.[77] Still, the court left the door to *exclusion* decidedly open as it noted, "Probity in this context is not an absolute; *its value must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference.*"[78]

The court then emphasized that the admissibility of extrinsic offense evidence depends, at least to some extent, on the *other evidence* presented by the prosecution to prove intent.[79] Thus, a strong government case on the intent issue minimizes the need for extrinsic evidence and, therefore, makes it more readily excludable.[80] Indeed, the court added, "*If the defendant's intent is not contested, then the incremental probative value of the extrinsic offense is inconsequential when compared to its prejudice; therefore, in this circumstance the evidence is uniformly excluded.*"[81] The court noted that evidence offered to prove a point conceded by the opponent should be excluded as a "waste of time and undue prejudice (see Rule 403), rather than under any

72. *Id.* at 913. As discussed below, social science universally and vigorously disputes this premise.
73. *Id.*
74. *Id.*
75. *Id.* at 914.
76. *Id.*
77. *Id.*
78. *Id.* (emphasis added).
79. *Id.* at 914 n.18.
80. *Id.* at 914.
81. *Id.* (emphasis added).

general requirement that evidence is admissible only if directed to matters in dispute."[82] Finally, the court highlighted that *"[w]here, however, [specific] intent is not an element of the crime charged, extrinsic offense evidence directed to that issue would be irrelevant and therefore subject to exclusion under [R]ule 402."*[83]

Moving beyond the elements of the crime, the court noted the importance of the "posture of the case" in determining the admissibility of extrinsic offense evidence.[84] For instance, if it is unclear early in the trial whether the defendant will contest the intent issue, the extrinsic offense evidence probably should not be presented in the prosecution's case-in-chief.[85] Oddly, the majority explicitly reserved judgment, however, on the issue of whether "a mere plea of not guilty justifies the government in introducing extrinsic offense evidence in its case-in-chief."[86] The court noted, however, that extrinsic evidence would be irrelevant and, therefore, inadmissible where specific intent is not an element of the crime charged.[87]

The majority also noted that the admissibility of extrinsic offense evidence depends on the similarity between the charged crime and the extrinsic offense as well as the time between the two offenses.[88] The court recognized though that

> the more *closely* the extrinsic offense resembles the charged offense, the *greater the prejudice* to the defendant. The likelihood that the jury will convict the defendant because he is the kind of person who commits this particular type of crime or because he was not punished for the extrinsic offense increases with the increasing likeness of the offenses.[89]

The court then applied these principles to the facts of the *Beechum* case. It held that the credit card evidence was relevant to Beechum's intent because proof that he "possessed the credit cards with illicit intent diminishe[d] the likelihood that at the same moment he intended to turn in the silver dollar."[90] The court also found that there was sufficient evidence for the trial court to rule, under Rule

82. *Id.* at 914 n.19.
83. *Id.* (emphasis added).
84. *Id.* at 915.
85. *Id.*
86. *Id.*
87. *See id.* at 914 n.19 (noting that because the law permits jurors to presume that the defendant intends the natural consequences of his acts, general intent as an element could only refer to specific intent crimes; thus the government, having shown the charged act, generally has no additional need to prove the general intent of the defendant unless she argues a lack of intent, i.e., accident, mistake, or self-defense); *infra* notes 212-26 and accompanying text.
88. *Beechum*, 582 F.2d at 915.
89. *Id.* at 915 n.20 (emphasis added).
90. *Id.*

104(b), that the jury could have found Beechum "possessed these cards with the intent permanently to deprive the owners of them."[91] Thus, the first step of the test was satisfied.

The majority held that the second step was also satisfied because *there was not much other evidence on the intent issue*, the *defendant clearly put intent in issue by his testimony on direct examination*, there was *no temporal remoteness problem*, and *the extrinsic offense was not of such a heinous nature that it would incite the jury to an irrational decision*.[92] The majority reasoned that the trial court minimized any prejudice by giving limiting instructions,[93] while noting that the court should consider the effectiveness of such instructions.[94] Thus, the court concluded that the extrinsic evidence passed the Rule 403 test of weighing probative value versus the risk of undue influence.[95] Therefore, both steps of the test were satisfied and the Fifth Circuit majority concluded that the extrinsic offense evidence concerning the Sears credit cards was properly admitted.[96]

B. THE *BEECHUM* DISSENT

In *United States v. Beechum*,[97] Circuit Judge Goldberg, joined in dissent by Judges Godbold, Simpson, Morgan, and Roney, made two broad arguments.[98] First, the dissent argued that the majority inappropriately interpreted Rule 404(b) and that the Rule's adoption did not require the abandonment of the *Broadway* test.[99] Second and more importantly, the dissent criticized the majority for reading the Rule as establishing "two watertight compartments": one containing propensity-only evidence and the other containing other-purpose evidence, with neither spilling over into the other.[100] The dissent argued against the existence of "such watertight compartments . . . unless we engage in subtle and sophisticated metaphysical analysis."[101] In short, the dissenters argued that it is impossible to distinguish intent

91. *Id.*
92. *Id.* at 916-17.
93. *See id.* at 917 ("[The trial court] gave extensive instructions to the jury on the limited use of extrinsic offense evidence employed to prove unlawful intent.").
94. Additionally the court noted that the Advisory Committee Notes to Rule 403 require the trial court to specifically consider the effectiveness of a limiting instruction in reducing the prejudicial impact of the inevitable and prohibited, propensity inference. *Id.*
95. *Id.* at 918.
96. *Id.*
97. 582 F.2d 898 (5th Cir. 1978).
98. United States v. Beechum, 582 F.2d 898, 919 (5th Cir. 1978) (en banc) (Goldberg, C.J., dissenting).
99. *Beechum*, 582 F.2d at 919.
100. *Id.* at 920.
101. *Id.*

from propensity. That is, proof of intent from past acts does not have a practical meaning different from proof of the propensity to have that intent.

The dissent used a statutory construction analysis to eloquently capture the fundamental flaw in the "inclusive" view of Rule 404(b) as it applies to the admission of extrinsic similar act evidence to prove intent in criminal cases.[102] The dissent first provided the text of Rule 404(b) to show how its language explicitly forbids the offer of other acts evidence to prove a defendant's propensity to commit the charged offense.[103] Operating from this axiomatic baseline, the dissent argued that the inclusive view of the second sentence of Rule 404(b), which permits the admission of the same evidence if offered for the non-propensity purpose of showing intent, negates the propensity exclusion from Rule 404(b)'s first sentence.[104] Indeed, the dissent argued that the expansive admission of other acts evidence on intent even runs afoul of the policy embodied in Rule 609, which deals with criminal conviction impeachment.[105] Federal Rule 609 takes an exclusionary approach to the impeachment of criminal defendants with prior convictions, particularly where the impeaching conviction is for a crime similar to the offense charged in the indictment.[106]

It is true, as the dissent points out, that Rule 404(b) provides seemingly conflicting policies.[107] On one hand, the rulemakers were extremely concerned about the enormously prejudicial impact of exposing the jury to earlier crimes or acts similar to the charged offense.[108] In the panel opinion in *Beechum*, which was reversed en banc, the court identified three such manifestations of prejudicial impact, "which seriously threaten the integrity of the criminal trial."[109] First, the admission of other crimes evidence invites the jury to consciously or subconsciously punish the defendant for the earlier crime by finding him guilty in the present trial.[110] Second, the other acts evidence invites the jury, irrespective of a limiting instruction, to make the forbidden propensity inference and to assume the defen-

102. *Id.*

103. *See id.* at 919-20 (quoting FED. R. EVID. 404(b)) ("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.").

104. *See id.* at 919 (stating that this reading "allows the second sentence to swallow up the first sentence of Rule 404(b)" because it establishes such a broad rule of admissibility under the second sentence of the Rule that it renders the first sentence of the Rule, and its inadmissibility standard, inapplicable in any situation).

105. *Id.* at 919.

106. *See infra* notes 319-23 and accompanying text.

107. *Beechum*, 582 F.2d at 919 (Goldberg, C.J., dissenting).

108. *Id.* at 920.

109. *Id.* at 920 n.2.

110. *Id.*

dant's guilt of the charged crime from his prior similar behavior.[111] Third, the panel feared that when presented with two uncompleted or unproved crimes (the extrinsic act and the charged act), the jury would "bootstrap" them together to find a single completed, charged crime.[112] All three fears are real and find support in the Rule's legislative history[113] and social science on jurors' tendencies.[114]

On the other hand, the Rule 404(b) does provide that certain extrinsic acts may be offered to prove elements of a charged crime, despite the danger that the jury may misuse the evidence.[115] There is broad consensus on the admissibility of certain categories of evidence. For instance, all agree that where the only purpose for the offer of extrinsic evidence is propensity, such evidence is inadmissible.[116] Most courts have noted that where the extrinsic act is offered to prove an element controverted by the defendant, the court may admit the act, particularly where the government has no other way to prove the element.[117] Still, all must acknowledge that even when evidence is admissible for a non-propensity purpose, all three of the panel majority's concerns remain present. Relevance on non-propensity issues does not negate the danger of propensity reasoning by the jury.

To summarize, according to the en banc dissenters, the *Beechum* majority believed that the universe of extrinsic act evidence is comprised of two "watertight compartments."[118] Conversely, the dissenters rightly found that the offer of extrinsic evidence of other acts on

111. *Id.*; *see infra* notes 339-52 and accompany text.

112. *Beechum*, 582 F.2d at 920 n.2 (Goldberg, C.J., dissenting).

113. *See, e.g.*, S. REP. NO. 93-1277, at 10 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7051, 7061 (discussing Rule FED. R. EVID. 609(a), which notes the danger of prejudice to the accused based on the introduction of prior convictions along with the potential impact on the ultimate question of guilt or innocence).

114. *See infra* notes 323-33 and accompanying text.

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

116. This strict rule predated the current version of the Federal Rules of Evidence and was codified in Rule 404(b). *See, e.g.*, Michelson v. United States, 335 U.S. 469, 475-76 (1948) (describing the traditional ban on propensity evidence).

117. *See, e.g.*, Huddleston v. United States, 485 U.S. 681, 685 (1988) (describing the universal rule for the acceptable use of extrinsic act evidence). For example, where a defendant claims he did not know the substance he possessed was marijuana, the fact that he had knowingly possessed marijuana in the past would be admissible on the issue of knowledge in the case of the charged offense. *See* United States v. Tan, 254 F.3d 1204, 1209 (10th Cir. 2001) (distinguishing the case from precedent and noting prior acts evidence was admissible because there was no other evidence from which the element could be inferred); United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994) (noting that following the defendant's not-guilty plea on the issue of drug possession with the intent to distribute, the government's evidence on the issue was admissible subject to the Rule 403 balancing test); *see also* United States v. Linares, 367 F.3d 941, 946 (D.C. Cir. 2004) (describing how extrinsic evidence, even if it goes to propensity, can be admissible if the prosecution has no other way to prove mental state by circumstantial evidence).

118. *Beechum*, 582 F.2d at 920 (Goldberg, C.J., dissenting).

the issue of intent or state of mind cannot fit neatly into only one of the compartments.[119] To offer extrinsic evidence of other acts on intent is to, simultaneously, offer it on propensity.[120] The dissent further dismissed as illogical the majority's faulty reasoning: "Thus the majority thinks the rule unequivocally allows us to reason that because a defendant displayed an improper intent in the past, he is more likely to have had an evil intent in the act for which he is tried."[121]

Though the issue of intent was controverted in *Beechum*, the dissenters issued a prescient warning based on a broader issue that the majority discussed in footnote nineteen. The dissenters interpreted the majority's footnote to mean that even if intent were not controverted, extrinsic act evidence would still be relevant and admissible.[122] However, this comment misconstrues the majority's view. More accurately, the majority stated that though the evidence may be relevant under Rule 401, where it is not contested, it could be rejected under Rule 403, but where intent is not an element of the crime charged, the issue would be irrelevant and excluded under Rule 402.[123] Again, since virtually every crime involves proof of some state of mind, this reference to "cases where intent is not an element" must logically refer to non-specific intent cases. Subsequent United States Court of Appeals for the Fifth Circuit panels, however, have realized the dissenters' worst fears by stating outright that even general intent is in issue when the defendant pleads guilty.[124]

Analyzing Rule 404(b) in this way, according to the dissent, makes the first sentence of the rule superfluous because evidence that is probative solely of bad character would be inadmissible as irrelevant under Rule 401.[125] To prove this point the dissent argued that it found it difficult to think of any extrinsic offense evidence that is pro-

119. *Id.* at 921.

120. *Id.*

121. *Id.* at 920.

122. *Id.*

123. *See id.* at 914, n.19 (majority opinion) ("Although it would seem that the extrinsic offense would be irrelevant if the issue of intent were not contested, the rules apparently deem evidence that has probative force with regard to an uncontested issue to be relevant. FC [sic] The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Advisory Committee Notes to Rule 401, 28 U.S.C.A. Rules of Evidence at 85 (1975). Where, however, intent is not an element of the crime charged, extrinsic offense evidence directed to that issue would be irrelevant and therefore subject to exclusion under rule 402. United States v. Lawrance, 480 F.2d 688, 690 (5th Cir. 1973).").

124. *See* discussion *infra*.

125. *Beechum*, 582 F.2d at 920 (Goldberg, C.J., dissenting).

bative solely of bad character.[126] The dissent concluded this section of its argument by saying,

> The alchemy of the majority opinion would radically change the rule from a total bar of the evidence regardless of the probative-prejudice balance to a balancing test substantially weighted in favor of admissibility, simply because a judge metaphysically classifies the question as propensity to intend rather than as propensity to commit.[127]

Thus, the dissent refused "to adopt the majority's Dr. Jekyll-Mr. Hyde interpretation of Rule 404(b)."[128]

The dissent also expressed concern that extrinsic offense evidence would be admissible to prove intent even where the defendant does not dispute intent.[129] With this apprehension in mind, the dissent lamented that "it might be that once intent is an element of the crime as it is with almost all crimes then the defendant is left only with the minimal protection afforded by the 'substantial prejudice' test in Rule 403."[130] The dissent further complained that this "lop-sided reading of Rule 404(b) is sheer illogic" and "invites a flagrant abuse of the rights of accused citizens."[131]

C. THE LESSONS OF *BEECHUM*

It is worth noting a number of things about the *United States v. Beechum*[132] decision. Though the court split six to five on the logical relevance of similar acts to show intent in the charged case, none of the eleven active United States Court of Appeals for the Fifth Circuit judges involved in the decision disagreed with the following: (1) where general criminal intent is part of the charge, courts should not admit other acts evidence under Rule 404(b) if the defendant has taken the matter of intent out of issue by stipulation, agreement, or waiver as a matter of logical relevance under Rule 401 and 404(b); (2) where there is other evidence of the defendant's intent (specific or general), the need for other acts evidence is significantly reduced; (3) Rule 403 prejudice to the defendant (the likelihood of the jury making the forbidden propensity inference) dramatically increases where other acts evidence is similar to the charged act(s); (4) if the other acts are "temporally remote" from the charged acts, their relevance diminishes; and

126. *Id.* at 921.
127. *Id.*
128. *Id.*
129. *Id.* at 921 n.4.
130. *Id.* at 921.
131. *Id.* at 921 n.5.
132. 582 F.2d 898 (5th Cir. 1978).

(5) the trial court must determine, *on a case by case basis*, whether a limiting instruction will truly be effective.

The dissent, of course, went further challenging the premise that a court and certainly jurors can somehow distinguish a prior act offered to prove propensity from a prior act offered to prove intent.[133] This complaint stemmed from the reality that, logically, a juror must infer that the accused has the intent in the present case because his propensity was shown in the prior case.[134] In short, Judge Goldberg and the dissenters argued that the same inference is required to prove either propensity or intent from the prior act.[135]

Moreover, the five dissenters opined that even where the defendant specifically puts his intent in issue by raising his lack of intent as a defense, prior acts logically cannot prove present intent, a view universally borne out by social science.[136] Finally, the dissenters articulated little or no confidence in the efficacy of a limiting instruction, a view also universally borne out by social science (and even questioned by the majority).[137]

D. CURRENT TREATMENT OF *BEECHUM* IN THE FIFTH AND ELEVENTH CIRCUITS

Remarkably, the current United States Courts of Appeals for the Fifth and Eleventh Circuits have rejected the dissenting opinion and much of the majority's view in *United States v. Beechum*,[138] on the admissibility of 404(b) evidence. Indeed, both circuits, which of course were at one time joined in a larger Fifth Circuit, have adopted rather extreme views of Rule 404(b) and intent. First, both courts uncritically buy into the notion that prior similar acts bearing the same intent as the present charge are *always* logically relevant to prove

133. *See* United States v. Beechum, 582 F.2d 898, 921 (5th Cir. 1978) (en banc) (Goldberg, C.J., dissenting) (arguing it is impossible for evidence to have relevancy for only propensity or only intent purposes).

134. *See Beechum*, 582 F.2d at 924-25 (questioning the wisdom of transforming the admissibility test into a subjective version of the traditional *Broadway* test).

135. *Id.* at 920.

136. *See id.* at 924 (pointing out the lack of reasoning behind the majority's "psychological indulgence" test in that it depends on a district judge's ruling of whether or not the defendant "indulged himself" in the "same state of mind" in both the prior and present crime without providing guidance for making this determination); *see also* discussion *infra*.

137. *See id.* at 917 & n.23 (majority opinion) (noting the lower court gave careful limiting instructions to the jury to reduce the undue prejudice "as much as limiting instructions can"); *id.* at 918-27 (Goldberg, C.J., dissenting) (abstaining from noting any confidence in the efficacy of a limiting instruction); *see also infra* notes 351-63 and accompanying text.

138. 582 F.2d 898 (5th Cir. 1978).

current intent.[139] Second, irrespective of whether the defendant contests the issue of general intent (when charged with a non-specific intent crime), i.e. irrespective of whether the accused waives the issue or even stipulates to the required intent, the Fifth Circuit has ruled that prior acts are always admissible to prove intent.[140] Third, both courts now take the position that the fact the government has more than sufficient (and less prejudicial) other evidence of intent does not preclude the government from offering prior acts to prove intent.[141] Fourth, both courts agree that a standard limiting instruction will *always* save the lower court's erroneous ruling that the probative value of the 404(b) evidence is not substantially outweighed by the prejudice inherent in the offer of 404(b) evidence.[142] Indeed, on no occasion has either the Fifth or Eleventh Circuit reversed a district judge on a finding that Rule 403 prejudice does not substantially outweigh the probative value of admitting 404(b) evidence on the issue of intent. Fifth,

139. *See* United States v. Roberts, 619 F.2d 379, 382 (5th Cir. 1980) (noting if the extrinsic offense required the same intent as the act in question, and the jury can find the defendant committed the extrinsic offense, the extrinsic evidence is relevant to an issue other than the defendant's character); *see also* United States v. Butler, 102 F.3d 1191, 1196 (11th Cir. 1997) (extending the rule allowing extrinsic evidence with similar intent to narcotics cases).

140. *See* United States v. Buchanan, 70 F.3d 818, 831 (5th Cir. 1995) (citing United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1987) (en banc)) ("The probative value of extrinsic offense evidence 'must be determined with regard to the extent to which the defendant's unlawful intent is established by other evidence, stipulation, or inference.'"); *see also* United States v. Williams, 900 F.2d 823, 827 (5th Cir. 1990) ("The . . . limited evidence the government could . . . adduce on the issues of knowledge and intent increases the incremental probity of the extrinsic evidence.").

141. In *Roberts*, the court refused to follow *Beechum's* suggested approach of excluding similar acts evidence in general intent cases, including situations where the defendant has made clear she will not contest the issue of intent. 619 F.2d at 383; *see* Vivian Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. MIAMI L. REV. 451, 457-58, 464 n.111 (1993). Indeed, as recently as 2008, the Fifth Circuit, in *United States v. McCall*, recognized its minority status among the circuits with regard to its treatment of general intent crimes and noted its resistance to the criticism that has attended that position. 553 F.3d 821, 828 n.21 (5th Cir. 2008). There are panel decisions by the Fifth Circuit in the intervening period that at least recognize that where the defendant offers to remove the issue from contention by stipulation or otherwise, the trial court should at least consider such offer as a factor in the balancing of probative value against unfair prejudice. *See Buchanan*, 70 F.3d at 831; *see also Williams*, 900 F.2d at 827. In both cases, however, the court found no error in the trial court's admitting similar acts evidence despite the offer to stipulate to the issue of intent.

142. *See* United States v. Hernandez-Guevara, 162 F.3d 863, 873-74 (5th Cir. 1998) (describing how the court has failed to find a reversible error even when the trial court failed to give a limiting instruction on extrinsic evidence altogether and further noting that it had not held giving only broad instruction constitutes reversible error without additional prejudice in the case since 1991); United States v. Diaz-Lizaraza, 981 F.2d 1216, 1225 (11th Cir. 1993) (finding a limiting instructing stating the extrinsic evidence could only be used on the issue of intent mitigated any possible prejudice from the admission of such evidence).

and finally, both courts have explicitly held that the defendant's mere entry of a not guilty plea places his general intent in issue and opens the door, in every case, to the government's offer of other acts evidence committed with a similar intent.[143] Indeed, it now appears that, at least in the Fifth Circuit, a criminal defendant can only avoid admission of other acts evidence by pleading guilty to the crime charged, regardless of whether it is a specific or general intent crime.

Although no other circuit has gone quite as far as the Fifth Circuit, many others have adopted equally questionable a priori rules, which tend to rather freely admit 404(b) evidence.[144] Most circuits have agreed that where a defendant enters a not guilty plea to an indictment that charges a specific intent offense or conspiracy, the defendant opens the door to all prior similar offenses.[145] These circuits, by definition, reject logic and social science in joining the Fifth and Eleventh Circuits in the belief that a jury may reasonably infer intent in the charged offense from a similar act on an earlier occasion.[146] Moreover, all express extraordinary confidence that a limiting instruction will always cure the overwhelming prejudice of the inherent propensity inference attached to the admission of Rule 404(b) evidence.[147]

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143. *See, e.g.*, *McCall*, 553 F.3d 821, 827-28 ("By pleading not guilty to the charges and requiring the government to prove the elements of its case, McCall made evidence of his general intent relevant."); United States v. Brugman, 364 F.3d 613, 620 (5th Cir. 2004) ("Because the crime for which Brugman was charged [and to which he pled not guilty] has as an element an intent requirement, Brugman's intent was at issue, and the admission of extrinsic evidence could therefore be relevant to prove intent."); United States v. Booker, 334 F.3d 406, 411 (5th Cir. 2003) (noting a mere not guilty plea in conspiracy cases raises the issue of intent sufficiently to allow extrinsic evidence on intent); United States v. Zapata, 139 F.3d 1355, 1358 (11th Cir. 1998) ("A defendant who enters a not guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent, which it may prove by qualifying Rule 404(b) evidence absent affirmative steps by the defendant to remove intent as an issue."); United States v. Tokars, 95 F.3d 1520, 1537 (11th Cir. 1996) (describing how admitting evidence of prior acts of money laundering and drug trafficking following a not guilty plea did not constitute an abuse of discretion by the lower court); United States v. Maxwell, 34 F.3d 1006, 1009 (11th Cir. 1994) (allowing extrinsic evidence on the issue of intent to distribute controlled substances when defendant made a not guilty plea); United States v. Cardenas, 895 F.2d 1338, 1341-45 (11th Cir. 1990) (finding in a case charging conspiracy and possession of narcotics with the intent to distribute evidence that the defendant had previously dealt drugs was admissible under Rule 404(b) because it was relevant to the issue of intent, which the defendant placed in issue by pleading not guilty to a conspiracy charge); U.S. v. Gordon, 780 F.2d 1165, 1174 (5th Cir. 1986) (noting a mere not guilty plea in conspiracy cases raises the issue of intent sufficiently to allow extrinsic evidence on intent); *Roberts*, 619 F.2d at 383 (same).

144. *See infra* notes 148-96 and accompanying text.

145. *See infra* notes 148-96 and accompanying text.

146. *See infra* notes 148-96 and accompanying text.

147. *See infra* notes 148-96 and accompanying text.

E. Admissibility of Other Acts Evidence on Intent Under Rule 404(b) of the Federal Rules of Evidence in the Other Circuits

Following *United States v. Beechum*,[148] all of the circuits have adopted similar tests requiring a combination of proper purpose, relevance, and Rule 403 analysis before finding other acts evidence admissible.[149] Though the general consensus is a preference for admissibility, some circuits still have limited circumstances in which prior acts evidence will be deemed inadmissible.[150] The remainder of this section provides some of the nuances of the circuits' treatments of this issue.

Beyond its general admissibility test, the United States Court of Appeals for the First Circuit has ruled that Rule 404(b) evidence is admissible to prove an element of the crime charged, even if the defense only generally denies the charges (as opposed to specifically denying an element, which would put it directly in issue).[151] Thus, it is not entirely clear whether a criminal defendant can avoid introduction of Rule 404(b) other acts evidence by raising a defense that does not dispute intent or by simply raising no defense at all, challenging only the sufficiency of the evidence. What is clear is that Rule 404(b) evidence can become admissible if it is relevant to an issue the defendant specifically denies at trial.[152] It has also become established that if the crime charged is a "specific intent" crime, which requires the government to prove a particular element (i.e. intent), Rule 404(b) other acts evidence may be admissible to prove that element.[153]

148. 582 F.2d 898 (5th Cir. 1978).

149. *See supra* note 67 and accompanying text.

150. *See, e.g.*, United States v. Murray, 103 F.3d 310, 317-19 (3d Cir. 1997) (holding evidence that one defendant committed an unrelated murder should not have been admitted under Rule 404(b) because it was unconnected to the present charges, quite different in circumstances, and highly prejudicial); United States v. Gordon, 987 F.2d 902, 909 (2d Cir. 1993) (holding evidence of the defendant's prior arrest for possessing a small amount of cocaine should not have been admitted to demonstrate intent because it was not sufficiently similar to the charged offenses of conspiracy, drug importing, and possession with intent to distribute and was highly prejudicial); United States v. Arias-Montoya, 967 F.2d 708, 710 (1st Cir. 1992) (finding the defense of not knowing drugs were present in borrowed car put intent in issue, although Rule 404(b) other acts evidence consisting of defendant's prior conviction for cocaine possession should not have been admitted to prove it).

151. United States v. Oppon, 863 F.2d 141, 146-47 (1st Cir. 1988).

152. *See, e.g., Arias-Montoya*, 967 F.2d at 710 (finding a defense of not knowing drugs were present in borrowed car put intent in issue, although Rule 404(b) other acts evidence consisting of defendant's prior conviction for cocaine possession should not have been admitted to prove it).

153. *See, e.g.*, United States v. Ferrer-Cruz, 899 F.2d 135, 138-39 (1st Cir. 1990) (ruling the fact that the government had to specifically prove intent to distribute made other-acts evidence admissible to prove it). There are other reasons beyond intent for which prior acts evidence can be admissible. *See, e.g.*, United States v. DeCicco, 370

The United States Court of Appeals for the Second Circuit started with the broad proposition that prior acts evidence should be inadmissible if the defendant does not directly dispute the issue at trial.[154] More recent cases, however, have shown a more inclusive view that reaches beyond instances where the element is directly "in issue."[155]

The United States Court of Appeals for the Third Circuit takes a restrictive view of Rule 404(b) by focusing on what the government has to prove instead of what the defendant stipulates.[156] Still, a defendant can remove an issue by making a comprehensive and unreserved offer to stipulate.[157]

The United States Court of Appeals for the Fourth Circuit recognizes that Rule 404(b) evidence can become admissible if it is relevant to an issue the defendant specifically disputes at trial.[158] Rule 404(b) evidence can also become admissible if it is relevant to an issue, such as intent, which the government must specifically prove under the charged offense.[159]

The United States Court of Appeals for the Sixth Circuit started out, as did many other circuits, with a restrictive view of other acts evidence, holding that it must be relevant to an issue genuinely dis-

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F.3d 206, 212-13 (1st Cir. 2004) (finding other acts evidence can be admitted to show the defendant's common scheme or plan); United States v. Balsam, 203 F.3d 72, 85 (1st Cir. 2000) (determining other acts evidence can be admitted to "complete [the] story").

154. *See* United States v. Colon, 880 F.2d 650, 658-59 (2d Cir. 1989) (holding evidence of the defendant's prior sales of heroin to undercover officers should not have been admitted under Rule 404(b) in a case charging distribution of heroin within one thousand feet of a school because the defendant's defense was to completely deny any participation in the charged offense, without disputing intent and in fact offering to stipulate to intent).

155. *See* United States v. Johns, 324 F.3d 94, 98 (2d Cir. 2003) (admitting, in a drug dealing case, evidence that the defendant had engaged in prior discussions about unrelated drug transactions to show relationships and general intent); *see also* United States v. Berrios, 170 F. App'x 760, 761 (2d Cir. 2006) (admitting, in a case charging firearm possession by a felon in connection with another felony, the details of that other felony, a drug dealing relationship with an informant "for the proper purpose of establishing the circumstances surrounding the events or intent for which certain acts were performed").

156. United States v. Sampson, 980 F.2d 883, 888 (3d Cir. 1992) ("The parameters of Rule 404(b) are not set by the defense's theory of the case; they are set by the material issues and facts the government must prove to obtain a conviction.").

157. United States v. Jemal, 26 F.3d 1267, 1274 (3d Cir. 1994).

158. *See, e.g.*, United States v. Beahm, 664 F.2d 414, 417 (4th Cir. 1981) (holding, in a case charging two counts of taking indecent liberties with children on a U.S. military installation, evidence that the defendant had engaged in similar conduct with two other boys three years earlier was admissible under Rule 404(b) to prove intent, which the defendant sharply disputed at trial).

159. *See, e.g.*, United States v. Hadaway, 681 F.2d 214, 217 (4th Cir. 1982) (holding, in a case charging aiding and abetting a theft, evidence of other uncharged, subsequent similar operations was admissible under Rule 404(b) to prove intent).

puted at trial in order for it to be admissible.[160] The Sixth Circuit has ruled that a not guilty plea does not automatically make intent a genuinely disputed issue.[161] Even where general intent is a formal element of the crime, if intent can be inferred from proof that the defendant committed the crime, the Sixth Circuit has held that other acts evidence generally should not be admitted to prove it.[162] Like most other circuits, the Sixth Circuit has adopted a general rule of admissibility if the crime charged requires proof of specific intent[163] or if the evidence is relevant to an issue that the defendant specifically disputes at trial.[164]

Like the Fifth, Sixth, and Eleventh Circuits, the United States Court of Appeals for the Seventh Circuit has held that Rule 404(b) other acts evidence can become admissible if the defendant pleads not guilty to a specific intent crime, putting intent in issue[165] or if a defendant specifically disputes an issue.[166] If, however, specific intent is not required, and only general intent is a formal issue, 404(b) other acts evidence should not be automatically admissible or the exception will swallow the rule.[167] Still, the Seventh Circuit, over time, has recognized numerous crimes as specific intent crimes, meaning that a not guilty plea to such a charge automatically puts intent in issue.[168]

The United States Court of Appeals for the Eighth Circuit has noted that a simple not guilty plea to any charge will not always put intent or knowledge in issue for the purpose of admitting Rule 404(b) other acts evidence.[169] Like other circuits, the Eighth Circuit has

160. United States v. Ring, 513 F.2d 1001, 1007-08 (6th Cir. 1975). The *Ring* decision was issued before the Federal Rules of Evidence, including Rule 404(b), went into effect.

161. *Ring*, 513 F.2d at 1007-08.

162. *Id.*

163. *See, e.g.*, United States v. Hamilton, 684 F.2d 380, 384 (6th Cir. 1982) (concerning possession of altered money).

164. *See, e.g.*, United States v. Benton, 852 F.2d 1456, 1467-68 (6th Cir. 1988) (determining a police officer defendant's defense that he was not engaging in extortion but was instead carrying out a drug investigation put intent in issue).

165. *See* United States v. Shackleford, 738 F.2d 776, 781 (7th Cir. 1984), *abrogated on other grounds by* Huddleston v. United States, 485 U.S. 681 (1988) ("When the crime charged requires proof of specific intent, we have held that, because it is a material element to be proved by the government, it is necessarily in issue and the government may submit evidence of other acts in an attempt to establish the matter in its case-in-chief, assuming the other requirements of Rule 404(b) and 403 are satisfied.").

166. *See, e.g.*, United States v. Tai, 994 F.2d 1204, 1208-11 (7th Cir. 1993) (finding, in a case charging collection of debt by extortionate means, defense that the defendant had no intent to threaten because the translation sounded more threatening than intended put intent in issue and made prior acts evidence admissible to prove this issue).

167. *Id.*

168. *See, e.g.*, United States v. Mazzanti, 888 F.2d 1165, 1170-72 (7th Cir. 1989) (finding conspiracy and possession with the intent to deliver were such crimes).

169. United States v. Rogers, 91 F.3d 53, 56 (8th Cir. 1996).

held that Rule 404(b) other acts evidence can become admissible if it is relevant to an issue that the defendant puts in issue by raising specific types of defenses.[170]

Like other circuits, the United States Court of Appeals for the Ninth Circuit began with a relatively restrictive view of the admissibility of other acts evidence, holding that if the defendant simply denied involvement in a crime, his intent is not in issue and Rule 404(b) other acts evidence is not admissible.[171] Like the Fifth, Sixth, Seventh, and Eleventh Circuits, the Ninth Circuit has adopted the approach that Rule 404(b) other acts evidence can become admissible if it is relevant to an issue the government has to specifically prove as an element of the crime charged[172] or if the defendant puts it in issue by specifically disputing it.[173]

The United States Court of Appeals for the Tenth Circuit has required that Rule 404(b) other acts evidence offered to show intent be "reasonably similar and close in time to the offense charged."[174] In addition, it has held that being arrested is not a prior act that can be admissible under Rule 404(b).[175] The Tenth Circuit has also held that the government must specifically articulate, and the trial court must specifically accept, the material issue that Rule 404(b) evidence is being admitted to prove.[176] Like the Fifth and Eleventh Circuits, the Tenth Circuit has determined that Rule 404(b) prior acts evidence can become admissible if it is relevant to an issue that the government must specifically prove as an element of the crime charged, even if the defendant does not specifically dispute that issue at trial.[177] Also like other circuits, the Tenth Circuit has held that Rule 404(b) other acts evidence is admissible if it is relevant to an issue the defendant specifically disputes at trial.[178]

Finally, the United States Court of Appeals for the District of Columbia Circuit has found that "Rule 404(b), although framed restric-

170. *See, e.g.*, United States v. Weddel, 890 F.2d 106, 107-08 (8th Cir. 1989) (finding a self-defense claim put intent in issue).

171. United States v. Powell, 587 F.2d 443, 448 (9th Cir. 1978).

172. *See, e.g.*, United States v. Houser, 929 F.2d 1369, 1373 (9th Cir. 1990) (including conspiracy to distribute methamphetamine in this list).

173. *See, e.g.*, United States v. Bailleaux, 685 F.2d 1105, 1109-12 (9th Cir. 1982) (finding evidence probative of identity was admissible because the defendant disputed identity).

174. United States v. Suntar Roofing, Inc., 897 F.2d 469, 479 (10th Cir. 1990).

175. *See* United States v. Robinson, 978 F.2d 1554, 1559 (10th Cir. 1992) ("The mere fact that an arrest was made is not, in and of itself, a 'prior bad act' which the prosecution may introduce into evidence.").

176. United States v. Birch, 39 F.3d 1089, 1093 (10th Cir. 1994).

177. *See, e.g.*, *Suntar Roofing*, 897 F.2d at 479-80 (dealing with a crime of conspiracy to allocate roofing customers in violation of the Sherman Act).

178. *See, e.g.*, United States v. Harrison, 942 F.2d 751, 759-60 (describing the defense of specifically disputing the issue of knowledge and intent).

tively, [is] quite permissive" as it "prohibits 'other crimes' evidence in but one circumstance."[179] The issue that the Rule 404(b) other acts evidence is being admitted to prove, however, must actually be in dispute at trial.[180] Like most other circuits, the D.C. Circuit recognizes that Rule 404(b) other acts evidence is admissible if the defendant pleads not guilty to a specific intent crime.[181] The D.C. Circuit has held, however, that Rule 404(b) other acts evidence is not admissible simply to prove general intent.[182] Like most other circuits, the D.C. Circuit has recognized that Rule 404(b) other acts evidence is admissible if relevant to an element (including intent) that the defendant puts in issue by specifically disputing it.[183] The D.C Circuit has gone further than some in ruling that the defendant's unequivocal offer to stipulate to the specific intent required for conviction in no way precludes the trial court from admitting similar acts evidence.[184]

In addition to permitting proof of similar acts evidence to prove intent in specific intent cases, a large number of federal appellate courts have created a special inclusionary rule for the admission of Rule 404(b) other similar crimes evidence in a case where conspiracy is charged.[185] Simply put, these courts have ruled that when a defendant enters a not guilty plea to a charge of conspiracy he or she has put his/her intent to participate in the conspiracy in issue, thereby making prior acts either of the conspiracy or of the crime that forms the substantive object of the conspiracy automatically admissible.[186]

The logical relevance of similar crimes evidence defies common sense and social science. The logical inference that one who has conspired before has conspired again in the present case is dubious, and its overwhelming prejudice is obvious. The special conspiracy rule, however, for other similar acts is even more attenuated in that it universally admits evidence of the prior similar substantive crime to prove a different crime, i.e. conspiracy. Thus, for example, the conspiracy application to Rule 404(b) other similar acts asks the jury to

179. United States v. Jenkins, 928 F.2d 1175, 1180 (D.C. Cir. 1991).

180. United States v. Rogers, 918 F.2d 207, 209-11 (D.C. Cir. 1990).

181. United States v. Latney, 108 F.3d 1446, 1448 (D.C. Cir. 1997) (including aiding and abetting the distribution of crack cocaine).

182. United States v. Linares, 367 F.3d 941, 948 (D.C. Cir. 2004).

183. *See* United States v. Watson, 894 F.2d 1345, 1348-49 (D.C. Cir. 1990) (finding admissibility based on a defense of lack of knowledge about drugs and lack of intent to possess it).

184. United States v. Crowder, 141 F.3d 1202, 1209 (D.C. Cir. 1998) (en banc).

185. United States v. Harrison, 942 F.2d 751, 760 (10th Cir. 1991); *see* United States v. Darden, 70 F.3d 1507, 1539 (8th Cir. 1995) (stating that although the Eighth Circuit has not recognized an explicit conspiracy exception, it has noted the trial court's discretion to admit other acts evidence in a conspiracy case is even broader than it would be otherwise).

186. *See* United States v. Matthews, 431 F.3d 1296 (2005).

make the inferential leap from proof of a prior crime, such as murder, drug distribution, or securities fraud, to a finding of the intent to participate in a conspiracy to do the same crime.

Judge Tjoflat, the author of the original majority opinion in *United States v. Beechum*,[187] in his concurrence in a later Eleventh Circuit case, *United States v. Matthews*,[188] trenchantly and convincingly demonstrated the error of the approach followed in both the Fifth and Eleventh Circuits, both of which he has served as Chief Judge.

In *Matthews*, Terrance Matthews was convicted inter alia of conspiracy to distribute cocaine for acts that occurred in 2000.[189] At his trial, the court admitted evidence of Matthews's 1991 arrest for distribution of cocaine for the purpose of proving his intent particularly in a drug case occurring nine years earlier than the case at bar.[190] On appeal, the Eleventh Circuit upheld the admission of the 1991 arrest, ruling that "[i]n every conspiracy case . . . a not guilty plea renders the defendant's intent a material issue."[191] Continuing, the court held that an arrest for cocaine distribution will always be relevant on the issue of the defendant's intent to distribute *and* involve himself in a conspiracy.[192]

Though Judge Tjoflat concurred in the affirmance of Matthews's conviction because he was bound by Eleventh Circuit precedent, he wrote separately "to express [his] view that the circuit's doctrine with respect to the admission of Rule 404(b) evidence in conspiracy cases has evolved into one that undermines Rule 404(b) itself and represents a perversion of the circuit's doctrine in this context."[193] According to Judge Tjoflat, the evidence of the 1991 arrest was admitted "for no purpose except to show propensity to engage in criminal activity" in direct violation of Rule 404(a) and (b).[194] After all, Judge Tjoflat added, "[T]he admission of prior acts in the name of intent," is nothing more than the admission of evidence on propensity.[195] Where the government is required to prove conspiracy, evidence of a prior conspiracy may be relevant, but evidence of a prior substantive offense that is similar the object of the charged conspiracy is not relevant simply as a matter of logic.[196]

187. 582 F.2d 898 (5th Cir. 1978).
188. 431 F.3d 1296 (11th Cir. 2005).
189. United States v. Matthews, 431 F.3d 1296, 1298 (11th Cir. 2005).
190. *Matthews*, 431 F.3d at 1305-06.
191. *Id.* at 1311 (citing United States v. Roberts, 619 F.2d 379, 383 (5th Cir. 1980)).
192. *Id.*
193. *Id.* at 1313 (Tjoflat, J., concurring).
194. *Id.*
195. *Id.*
196. *Id.* at 1315-16.

As demonstrated by the above discussion, a general pattern has emerged for determining the admissibility of Rule 404(b) other acts evidence. First, most circuits began with a relatively restrictive view of the admissibility of Rule 404(b) other acts evidence but have since greatly expanded their interpretation of the Rule, finding it to be a rule of inclusion. Second, all circuits recognize that Rule 404(b) other acts evidence can be admissible if it is relevant to an issue that the defendant specifically disputes at trial. Third, most circuits either have an explicit conspiracy exception or simply include it in the list of specific intent crimes, allowing the government to introduce Rule 404(b) other acts evidence if the defendant merely pleads not guilty to the conspiracy charge. Fourth, most circuits recognize that a not guilty plea to a crime requiring the government to specifically prove an element, such as intent, puts that element in issue and opens the door to the admissibility of Rule 404(b) other acts evidence.

The main area of disagreement is whether a not guilty plea to a general intent crime is sufficient to put intent in issue for the purpose of admitting Rule 404(b) other acts evidence. The Fifth Circuit seems to have decided that a not guilty plea to any crime puts intent in issue, even without waiting to see whether it is truly in dispute. The government, therefore, can automatically introduce Rule 404(b) prior acts evidence even if the defendant has removed the issue from the case either by failing to dispute the matter or by affirmatively stipulating to the required intent, thus relieving the government of its burden of proof on the issue.

III. THE EFFECT OF THE DEFENDANT'S ATTEMPT TO REMOVE THE ISSUE OF INTENT BY STIPULATION

How have the circuits dealt with the defendant's willingness to stipulate to a finding of intent in the charged case? How should they? On numerous occasions defendants have attempted to take the element of intent "out of issue" in the case by offering to stipulate that if the jury finds the defendant committed the charged act the jury must find that he had the requisite intent. The obvious purpose of such a stipulation is to obviate the need for the government to prove intent by the use of other similar acts or crimes evidence. In order to truly understand the various circuits' treatment of the stipulation matter, we must turn to the case of *Old Chief v. United States*,[197] in which the United States Supreme Court analyzed the treatment of defendant-offered stipulations.

197. 519 U.S. 172 (1997).

Johnny Lynn Old Chief was convicted in the United States District Court for the District of Montana of (1) assault with a dangerous weapon, (2) use of a firearm in the commission of a violent crime, and (3) being a felon in possession of a firearm.[198] Prior to trial, Old Chief offered to stipulate to the fact that he was a convicted felon in order to preclude the government from offering evidence of the name and nature of his prior convictions, which included a serious assault, as part of its proof of the felon-in-possession charge.[199] Old Chief argued that if the court rejected the stipulation, the similarity between the assault conviction and the current charges would unfairly prejudice him.[200] At the same time, the stipulation would provide the government with proof beyond a reasonable doubt of the "felon" element of the felon-in-possession charge.[201] After the district court denied Old Chief's motion to require the government to accept his proffered stipulation, the government offered the evidence and circumstances of the prior assault conviction.[202] The United States Court of Appeals for the Ninth Circuit affirmed the conviction on the three pending charges.[203]

The United States Supreme Court reversed, ruling that the trial court abused its discretion under Federal Rule of Evidence Rule 403 by failing to require the government to accept Old Chief's stipulation and by admitting the evidence of the name and nature of the prior conviction to prove Old Chief's felon status.[204] The Court, through Justice Souter, began its analysis by recounting the history and purpose of the Rule 403 exclusion.[205] Citing the Advisory Committee Note to Rule 403, the Court reminded us that "unfair prejudice" refers to the "tendency of evidence to suggest decision on an improper basis . . . ."[206] This risk arises where "otherwise relevant evidence" provides a bad impression of the defendant's character, thereby inviting conviction, not on the evidence of the defendant's acts regarding the charged offense, but rather on the basis of retribution for the defendant's past acts or a desire for preventative conviction.[207]

The Court went on to say that in performing the Rule 401-403 calculus, a court could consider the proffered evidence as an isolated item of evidence, independent of the case's context or the availability

198. Old Chief v. United States, 519 U.S. 172, 174, 177 (1997).
199. *Old Chief*, 519 U.S. at 175.
200. *Id.*
201. *Id.*
202. *Id.* at 177.
203. *Id.*
204. *Id.* at 178-79.
205. *Id.* at 180.
206. *Id.*
207. *Id.* at 180-81.

of alternative and less prejudicial means of proof of the same fact.[208] The Court rejected this approach, however, and ruled that the trial court should consider the proffered evidence in the context of the larger case and with an eye toward alternative methods of proof that carried less or no prejudice.[209] The Court pointed out that if a court were to follow the first, now rejected, approach, it would encourage the proponent of the evidence to offer the most prejudicial evidence available without recourse to equally efficacious but less prejudicial alternatives.[210] In sum, the Court held the 401-403 balancing test must determine "whether the danger of unfair prejudice outweighs the probative value of the [proffered] evidence in view of the availability of other means of proof and other facts appropriate for making [a] decision of this kind . . . ."[211]

In Old Chief's situation, the stipulation provided a much better alternative for proving his felon status because it provided the government with the legitimate probative (indeed, conclusive) evidence required to prove the element of the crime without seriously prejudicing the defendant.[212] After all, the Court found that the admission of evidence of past convictions for assault and gun crimes in a case charging assault and gun crimes substantially increases the risk of unfair prejudice.[213] Whereas here, the defendant offered conclusive proof of the element of the current charge as an alternative to evidence of past crimes similar to the charged offenses, the trial judge abused his discretion in permitting the admission of the name and nature of the past crimes.[214]

At the same time, the Court was clear that the trial court should have figured into its calculus the fact that the government ordinarily is entitled to prove its case with the evidence of its choice and is entitled to the "full evidentiary force" of its chosen evidence.[215] To allow the defendant to, at his election, stipulate away all of the damaging evidence against him could deprive the government of the persuasive force of its evidence and case.[216] Thus, the Court ruled that in determining the admissibility of the government's evidence in the face of a Rule 403 objection, a court should consider not only less prejudicial proof alternatives but also the evidentiary richness and "fair and legit-

208. *Id.* at 182-83.
209. *Id.* at 184-85.
210. *Id.* at 183.
211. *Id.* at 184.
212. *Id.* at 191.
213. *Id.*
214. *Id.*
215. *Id.* at 186-87.
216. *Id.* at 187.

imate weight" of the government's chosen proof in the telling of its story.[217]

The Court described this "fair and legitimate weight" as a tangible thing that does not simply satisfy the formal definitions of an offense but weaves a rich and descriptive story of events.[218] The ability to present evidence is vital to striking at the heart of many things at once, like motive, intent, capacity, or causation.[219] This non-linear capacity brings evidence to a human and personal level, engaging the jury beyond the merely abstract and animating the realm of morally significant justice.[220] Whether expectations are preconceived or built by the prosecution's actions, juries may respond negatively when a stipulation disrupts the story created by evidence or breaks the narrative of the presentation.[221] The Court recognized this as a valid concern for the prosecution, stating that a "convincing tale can be told with economy, but when economy becomes a break in the natural sequence of narrative evidence, an assurance that the missing link is really there is never more than second best."[222] Using Old Chief as an example, the Court ruled the government's offer of the name and nature of the prior convictions added nothing to the telling of its narrative while the defendant's stipulation provided the full probative force of the government's offer while alleviating the clear danger of jury distraction and prejudice.[223]

Although the *Old Chief* Court, in a footnote, confined the precedential power of its holding to felon-in-possession cases, the *reasoning* of *Old Chief* is highly instructive in determining how to handle offers of other acts evidence on the issue of intent in criminal cases. *Old Chief* tells us that, on one hand, the government need not accept a stipulation to an element of a crime charged in the indictment, at least where the stipulation would deprive the government of the evidentiary richness and completeness of narrative to which the government is entitled in "telling the story" of the crime to the jury.[224] Where, however, the stipulation gives the government everything it needs regarding the element and the proffered other acts in no way enhance the persuasive narrative of the government's case, the trial court would abuse its discretion pursuant to Rule 403 by rejecting it.[225] This is true because in admitting evidence on the stipulated matter,

217. *Id.*
218. *Id.*
219. *Id.* at 187.
220. *Id.* at 187-88.
221. *Id.* at 188-89.
222. *Id.* at 189.
223. *Id.* at 191-92.
224. *Id.* at 187-88.
225. *Id.* at 190-91.

given the utter lack of need for the highly prejudicial other crimes evidence, the probative value side of the 401-403 balancing test would be substantially outweighed by the prejudice of the propensity inference as a matter of course.[226]

Superimposing this reasoning on the typical Rule 404 situation, in which the defendant admits that if he committed the crime, he possessed the required general intent, the admission of other crimes to show intent is an obvious abuse of discretion. Note that this would even be true in a specific intent crime case like possession with the intent to distribute a controlled substance. Obviously, if the defendant not only does not dispute the issue of intent but stipulates to it, then there is absolutely no justification for admitting the other crimes evidence.

The theory, clearly, is that stipulating to the issue is the equivalent of admitting that it is true and has been proven, thus removing the need for the prosecution to introduce Rule 404(b) other acts evidence to prove that issue. Although by doing so the defendant makes the prosecution's job easier, the obvious calculus is that it is worth it to prevent the fact finder from learning about the damaging other acts evidence. In an indictment that charges a general intent crime, the government has even less need of the other crimes evidence because the government enters the courtroom armed with the presumption that a defendant is presumed to intend the natural consequences of his actus reus, or act, and absent the defendant's offer of evidence to rebut the presumption, the jury may find the intent from the act.

A. THE IMPACT OF *SANDSTROM V. MONTANA* AND ITS PROGENY

Thus, beyond the illogical basis for allowing prior acts on the issue of intent and the associated prejudice, the government does not require this evidence to prove intent in the vast majority of cases. The United States Supreme Court's opinion in *Sandstrom v. Montana*[227] and its progeny, specifically its discussion of inferring intent from the natural consequences of a defendant's act, provides a prime example.

In the case, the defendant, David Sandstrom, was charged under a Montana statute with "deliberate homicide."[228] Sandstrom argued that he could not be guilty of deliberate homicide because he did not possess the requisite "purposeful or knowing" mental state.[229] At trial, the prosecution requested the judge to instruct the jury that

226. *Id.* at 191.
227. 442 U.S. 510 (1979).
228. Sandstrom v. Montana, 442 U.S. 510, 512 (1979).
229. *Sandstrom*, 442 U.S. at 512.

"[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."[230] Defense counsel argued against this instruction based on the theory that it shifted the burden of proving the mental element of the charged crime to the defense.[231]

After appeal,[232] the Supreme Court held that the government cannot obtain a jury instruction for a mandatory presumption requiring the jury to find intent from the natural and probable consequences of the defendant's acts and can no longer even obtain an instruction for such a rebuttable presumption.[233] The Court reasoned that such an instruction might have the consequence of overriding the fundamental presumption of a defendant's innocence.[234] Put another way, such an instruction was problematic because it exempted the state from proving every element of the crime beyond a reasonable doubt.[235] After *Sandstrom* and the related cases,[236] however, the government remains entitled to an instruction that *permits* the jury to

230. *Id.* at 513.
231. *Id.*
232. State v. Sandstrom, 580 P.2d 106 (Mont. 1978).
233. *Sandstrom*, 442 U.S. at 524.
234. *Id.* at 523.
235. *Id.* at 523.
236. In *County Court of Ulster County v. Allen*, the Court dealt with the issue of the presumption that the defendants possessed illegal handguns after police found the guns in their vehicle during a routine stop for speeding. 442 U.S. 140, 142-44 (1979). The Court found inferences about an ultimate issue from a preliminary fact were constitutional as long as they were permissive and not mandatory. *Allen*, 442 U.S. at 157. The Court explained that the constitutionality of permissive inferences should be examined factually. *Id.* That is, a court should determine whether, in light of all of the evidence, there is a rational connection between the fact and the ultimate conclusion. *Id.* The inference should only be deemed invalid if this inference is irrational. *Id.* Conversely, mandatory presumptions must be reviewed facially, without the context of the evidence. *Id.* at 157-58. This higher standard results from the shifting burden of a mandatory presumption, which places the onus on the defendant to rebut the inference. *Id.* at 157. The Supreme Court directly reviewed the *Sandstrom* standard in *Francis v. Franklin* and reaffirmed its findings. 471 U.S. 307, 308 (1985). The case involved a malice murder charge and a defense that the alleged murderer had not possessed the requisite intent. *Francis*, 471 U.S. at 310-11. The key issue was the constitutionality of

> jury instructions stating that: (1) [t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted and (2) [a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.

Id. at 309 (alterations in original). The Court examined whether a reasonable juror could have interpreted the instructions as a mandatory presumption. *Id.* at 316-17. It also discussed whether the accompanying instructions had adequately explained the legal effect of such a presumption. *Id.* at 318. Ultimately it found the instruction to be unconstitutional because it failed on both of these issues. *Id.* at 325. Overall, the Court affirmed *Sandstrom*. It noted a jury instruction that could be read by a reasonable juror as calling for a mandatory presumption is unconstitutional if the surrounding language in the instruction does not cure the danger of this potential juror interpretation. *Id.* at 325. The Court further explained that, in this way, a permissive burden presumption can be as unconstitutional as a mandatory presumption. *Id.* at 316.

infer intent (general or even specific) from the act itself in the context of the entirety of the circumstances surrounding or accompanying the act.[237] Thus, by simply proving the actus reus, the jury is permitted in *every case* to infer the defendant's intent if the intent is the natural consequence of the act.[238]

In most cases, this could not be simpler. For example, in a murder case, where the government shows that the defendant took aim a few seconds before firing to the upper body of the victim, a jury can easily find the specific intent to kill beyond a reasonable doubt.[239] In an armed robbery case, the act of the armed robbery itself easily puts the government over the line of proof beyond a reasonable doubt of intent irrespective of the defendant's record. Indeed, unlike proof of motive, where other acts may add to the appropriate "narrative" of the government's circumstantial story of the crime, the offer of other similar but unrelated criminal acts *in no way* adds to the narrative of the government's proof of intent in the charged case.[240]

For example, a jury instruction on "the natural and probable consequences of the defendant's act(s)" which passes constitutional muster would go like this:

> The burden is upon the government to prove each and every element of the indictment beyond a reasonable doubt. The defendant is presumed innocent throughout the trial and that presumption remains unless and until you the jury find him guilty of the charge beyond a reasonable doubt. That said, if you the jury find that the defendant committed the charged act beyond a reasonable doubt, you may infer from the act and all its surrounding circumstances that the defendant in-

237. *See* United States v. Guyon, 717 F.2d 1536, 1539 (6th Cir. 1983) (upholding the instruction that a jury may infer intent from the circumstances surrounding the incident including defendant's statements or acts); *see also* United States v. Hunt, 129 F.3d 739, 743 (5th Cir. 1997) (describing how the court can infer intent to deal drugs from possession of a certain quantity of the drug in question along with a consideration of the surrounding circumstances).

238. *See Allen*, 442 U.S. at 157 ("[A] common evidentiary device is the entirely permissive inference or presumption, which allows-but does not require-the trier of fact to infer the elemental fact from proof by the prosecutor of the basic one and which places no burden of any kind on the defendant."); *see also Francis*, 471 U.S. at 314 ("A permissive inference does not relieve the State of its burden of persuasion because it still requires the State to convince the jury that the suggested conclusion should be inferred based on the predicate facts proved.").

239. *See, e.g.*, PA. SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 15.2502A(5) (Pa. Bar Inst. 2005) ("If you believe that the defendant *intentionally used a deadly weapon* on a vital part of the victim's body, you may regard that as an item of circumstantial evidence from which you may, if you choose, *infer* that the defendant had the specific intent to kill.") (emphasis added).

240. *See* Imwinkelried, *supra* note 3, at 583 (describing how this type of evidence requires an illogical thought-process because "[t]he charged offense occurred at one time and place while the uncharged crime ordinarily occurs at a different time and place").

> tended the natural and probable consequences of that act beyond a reasonable doubt (whether or not the defendant offers any evidence on the issue of his intent).[241]

Thus, by merely proving the actus reus in the vast majority of criminal prosecutions, the government has already offered sufficient evidence of intent from which the fact finder can find guilt beyond a reasonable doubt. This low burden further minimizes the need for other similar but unrelated acts evidence. Therefore, in the ordinary case where intent is not actively contested there is essentially no arguable, legitimate rationale for admitting other similar acts. Further, in any case where the defendant stipulates to intent, there is no possible justification for the admission of other similar acts on the issue of intent under the *Old Chief v. United States*[242] rationale.

Despite the persuasive power and logic of the *Old Chief* rationale for excluding 404(b) acts offered on the issue of intent, most federal appellate courts have interpreted *Old Chief* narrowly and as if the case forbids them from balancing the need for the other act evidence against its prejudice.[243] It is worth pointing out that *Old Chief* provided no such blanket prohibition. Though some applications of Rule 404(b) have produced universal standards of admissibility, the rules for admissibility of prior acts evidence following a defendant's offer to stipulate were historically more variable. Unfortunate general agreement emerged, however, following the seminal *Old Chief* decision.

B. PRIOR TO *OLD CHIEF*

Prior to *Old Chief v. United States*,[244] the United States Court of Appeals for the First Circuit recognized limited circumstances in which the prosecution was required to accept the defendant's offer to stipulate. In order to prevent admission of prior acts evidence, the defense had to (1) express a clear and unequivocal intention to remove the issues so as to truly represent an offer to stipulate and (2) cover the requisite substantive ground to remove the issue from the case.[245] The United States Court of Appeals for the Second Circuit held that

241. *See Sandstrom*, 442 U.S. at 514-15 (explaining the difference between mandatory and permissive presumptions in jury instructions); *see also Francis*, 471 U.S. at 313-15 (describing the difference between unconstitutional mandatory presumptions and constitutional permissive presumptions); *Allen*, 442 U.S. at 157 (discussing the rationale behind the constitutionality of permissive presumptions in jury instructions).

242. 519 U.S. 172 (1997).

243. *See infra* notes 253-70 and accompanying text.

244. 519 U.S. 172 (1997).

245. *See* United States v. Garcia, 983 F.2d 1160, 1174 (1st Cir. 1993) (holding the prosecution was not required to accept the defendant's offer not to argue the issue of knowledge because it was not the equivalent of an offer to stipulate).

the prosecution was required to accept a defendant's unequivocal offer to stipulate to knowledge and intent when such a stipulation was intended to keep other acts evidence out of the case because of the "dangerous prejudicial value" of such other acts evidence.[246] The United States Court of Appeals for the Third Circuit found evidence of prior bad acts inadmissible following a defendant's stipulation due to the low relevance and high risk of undue prejudice.[247] The United States Court of Appeals for the Fifth Circuit followed the general rule that a party may not preclude its adversary's evidence by admission or offer to stipulate with some limited exceptions.[248] The United States Court of Appeals for the Eighth Circuit held that evidence of prior bad acts was inadmissible when the defendant removed a material state of mind issue.[249] The United States Court of Appeals for the Ninth Circuit left it to the trial court's discretion to determine whether the prosecution should be required to accept the defendant's offer to stipulate.[250] The United States Court of Appeals for the Eleventh Circuit generally did not require the prosecution to accept a stipulation offered by the defendant.[251] The United States Court of Appeals for the District of Columbia Circuit held that a defendant's offer to concede knowledge and intent, coupled with an explicit jury instruction that the government no longer had to prove either element, provided the government with all the benefit it would get from proving those two elements while avoiding the danger of propensity.[252]

246. United States v. Mohel, 604 F.2d 748, 754 (2d Cir. 1978).

247. United States v. Jemal, 26 F.3d 1267, 1274 (3d Cir. 1994) (noting the stipulation offer must be "comprehensive and unreserved" and the court must consider any reasonable arguments from the government concerning the inadequacy of defendant's stipulation proffer).

248. United States v. Spletzer, 535 F.2d 950, 955 (5th Cir. 1976); *see also* United States v. Yeagin, 927 F.2d 798, 802 (5th Cir. 1991) (reiterating the "general rule" but finding it is not controlling because admission of evidence of the defendant's nine prior felonies was irrelevant to the issue being contested).

249. United States v. Jenkins, 7 F.3d 803, 806 (8th Cir. 1993) (alteration in original) (noting a defendant may remove such an issue by "express[ing] a decision not to dispute that issue with sufficient clarity"), *abrogated by* Old Chief v. United States, 519 U.S. 172 (1997).

250. United States v. Dickey, 1992 WL 132958 (9th Cir. 1992); United States v. Lee, 800 F.2d 903, 904 (9th Cir. 1986).

251. *See* United States v. O'Shea, 724 F.2d 1514, 1516 (11th Cir. 1984) (noting the Eleventh Circuit had declined to adopt a per se rule for prior acts evidence either for or against admission and an offer to stipulate should be considered as a factor under the Rule 403 balancing test). *But see* United States v. Williford, 764 F.2d 1493, 1498 (11th Cir. 1985) (noting an exception to this general rule if a defendant unequivocally removes intent as an issue; then extrinsic acts evidence cannot be admitted for the purpose of proving intent).

252. United States v. Crowder, 87 F.3d 1405, 1410 (1996).

C. THE CIRCUIT VIEWS FOLLOWING THE *OLD CHIEF* DECISION

After the United States Supreme Court decided *Old Chief v. United States*,[253] a number of courts, oddly, began to coalesce around the rejection of the cogent reasoning of the case and ruled that the defendant's proffered stipulation admitting to either general or specific intent should have no impact on the decision to admit similar acts evidence on the issue of intent. These courts included the United States Court of Appeals for the Third, Fourth,[254] Sixth,[255] Seventh,[256] Eighth,[257] Ninth, and Tenth Circuits.[258]

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253. 519 U.S. 172 (1997).

254. *See, e.g.*, United States v. Martinez, 190 F. App'x 321, 323 (4th Cir. 2006) ("The Supreme Court and this circuit have both held that a stipulation does not render evidence tending to prove the underlying stipulation irrelevant . . . ."); United States v. Bivins, 104 F. App'x 892, 898 (4th Cir. 2004) (same).

255. *See* United States v. Bilderbeck, 163 F.3d 971, 978 (6th Cir. 1999) ("[P]rior acts evidence may be admissible under 404(b) to prove required specific intent, even if a defendant stipulates to intent . . . ."); *see also* United States v. Caldwell, 181 F.3d 104, 110 (6th Cir. 1999) (unpublished table decision) (citation omitted) ("The Supreme Court recognized an exception to this general rule only for stipulations to prior convictions as an element of an offense, and the circuits have shored the general rule against erosion since *Old Chief*."); *Bilderbeck*, 163 F.3d at 978 (noting all of the other circuits to consider the question had reached the same conclusion, that the defendant does not have the power to limit the prosecution's proof by offering to stipulate to an issue, with the small exception recognized in *Old Chief*).

256. *See* Gonzalez v. DeTella, 127 F.3d 619, 621 (7th Cir. 1997) ("The Court recognized in *Old Chief* that limiting the proofs to clinically abstract propositions may prevent the jurors from acquiring an accurate picture of events, and . . . may lead them to draw inaccurate inferences about what actually happened . . . ."); *see also* United States v. Williams, 238 F.3d 871, 876 (7th Cir. 2001) ("*Old Chief* counsels that a defendant's offer to stipulate to an element of an offense does not render inadmissible the prosecution's evidence of prior crimes to prove elements such as knowledge and intent."). *But see* United States v. Phillippi, 442 F.3d 1061, 1064 (7th Cir. 2006) (third, fourth, and fifth alterations in original) (citation omitted) (quoting *Old Chief*, 519 U.S. at 183 n.7, 190, 191) (explaining that "[t]he *[Old Chief]* Court deliberately limited its holding to 'cases involving proof of felon status,' because the holding depended on its conclusion that the evidentiary values of the stipulation and the evidence the government wished to present were 'distinguishable only by the risk [of prejudice] inherent in the one and wholly absent from the other'" and that its holding was limited because "'[t]he issue of substituting one [sort of evidence] for the other normally arises only when the record of conviction would not be admissible for any purpose beyond proving status, so that excluding it would not deprive the prosecution of evidence with multiple utility'").

257. *See, e.g.*, United States v. Hill, 249 F.3d 707, 712 (8th Cir. 2001) (citation omitted) ("[S]everal other circuits have recognized that *Old Chief* eliminates the possibility that a defendant can escape the introduction of past crimes under Rule 404(b) by stipulating to the element of the crime at issue."). *But see* United States v. Dorsey, 523 F.3d 878, 880 (8th Cir. 2008) (limiting the reach of *Old Chief* by concluding "*Old Chief*'s narrow holding that the prosecution must sometimes accept a defendant's stipulation does not apply to this case, for that opinion states that its 'holding is limited to cases involving proof of felon status,' and it distinguishes the situations in which prior criminal convictions are admitted under Rule 404(b)"); *see also* United States v. Trogdon, 575 F.3d 762, 766 (8th Cir. 2009) (citation omitted) ("[T]he Supreme Court's decision in *[Old Chief]* 'eliminates the possibility that a defendant can escape the introduction of past crimes under Rule 404(b) by stipulating to the element of the crime at issue.'"). The

Other courts, however, have implicitly applied the *Old Chief* reasoning to the admissibility equation of similar acts offered on intent. For instance, the United States Court of Appeals for the First Circuit recognized that the prosecution can only be required to accept the defendant's offer to stipulate when the stipulation will carry evidentiary weight equal to the evidence sought to be excluded.[259] The First Circuit, however, has read *Old Chief* in a way that could limit the admissibility of Rule 404(b) other acts evidence by finding potentially prejudicial evidence inadmissible where less prejudicial evidence on the issue is available.[260]

The United States Court of Appeals for the Second Circuit appears to still recognize *United States v. Mohel*[261] as good law but only in cases where the defendant is "trying to eliminate evidence of a single *unrelated* act from a case in which the prosecution would still be permitted to (at least attempt to) prove that the criminal transaction at issue did in fact take place."[262] In general, however, the Second Circuit recognizes the broad rule, reiterated in *Old Chief*, that the prosecution is free to prove its case without being hindered by the defendant's ability to stipulate parts of the case away.[263]

The Third Circuit and the United States Court of Appeals for the Fifth Circuit have not explicitly adopted *Old Chief* but both rely on pre-*Old Chief* cases that share the general tone of the seminal case.[264]

Eighth Circuit did not immediately embrace *Old Chief*, however, as it seemed to believe there were still some instances where a defendant could make a stipulation that the prosecution would have to accept. *See, e.g.*, United States v. Spence, 125 F.3d 1192, 1194 (8th Cir. 1997) (noting the defendant fell "far short of meeting [the still existing] rigorous standard" for rendering prior acts on intent inadmissible as he made no formal offer to stipulate intent out the case and his alleged unequivocal concession was at most an inference).

258. *See* United States v. Campos, 221 F.3d 1143, 1149 (10th Cir. 2000) (internal quotation marks omitted) (distinguishing between the defendant's offer to stipulate to main issues in the case and *Old Chief's* narrow focus on the "peculiarities of the element of felony-convict status and of admissions and the like when used to prove it"); *see also* United States v. Tan, 254 F.3d 1204, 1213 (10th Cir. 2001) (holding a defendant's offer to stipulate can still be considered in the Rule 403 balancing test concerning Rule 404(b) evidence, even though the prosecution is not required to accept the offer).

259. *See* United States v. Balsam, 203 F.3d 72, 84 (1st Cir. 2000) (refusing to require the prosecution to accept the defendant's stipulation offer to his earlier guilty plea in order to prevent the government from introducing the previous guilty plea); *see also* United States v. Garcia, 983 F.2d 1160, 1175 n.8 (1st Cir. 1993) (noting courts that do require the prosecution to accept an offer to stipulate also "generally require that the defendant be willing to accept a jury charge to the effect that the issue has been removed from the case").

260. United States v. Varoudakis, 233 F.3d 113, 122 (1st Cir. 2000).

261. 604 F.2d 748 (2d Cir. 1978).

262. United States v. Cottman, 1997 WL 340344, at *5 (2d Cir. 1997).

263. *Cottman*, 1997 WL 340344, at *5.

264. *See* United States v. Jemal, 26 F.3d 1267, 1274 (3d Cir. 1994) (noting the stipulation offer must be "comprehensive and unreserved" and the court must consider any

Thus, these Circuits appear to have followed the general rule reaffirmed in *Old Chief* with only limited exceptions.

Following *Old Chief*, the Ninth Circuit began to more closely follow the general rule that the defendant may not stipulate away the government's right to prove its case with the evidence of its choosing, with the small exception recognized in *Old Chief*.[265] Similarly, the United States Court of Appeals for the Eleventh Circuit recognized the limited nature of the exception to the general rule adopted in *Old Chief*.[266]

Finally, the United States Court of Appeals for the District of Columbia Circuit was one of the first courts to analyze the issue after the Supreme Court's decision in *Old Chief*. It led the way in interpreting *Old Chief* as adopting a limited exception to a broad general rule.[267] The court agreed "that trial courts may take offers to stipulate into account in making Rule 403 their determinations. . . . [b]ut we do not agree that the existence of the offer will necessarily be decisive."[268]

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reasonable arguments from the government concerning the inadequacy of defendant's stipulation proffer). Although it is technically possible, under *Jemal*, for a court to require the prosecution to accept a defense stipulation, it seems unlikely for this to happen. *See* United States v. Spletzer, 535 F.2d 950, 955 (5th Cir. 1976) (finding an exception to this general rule, however, because admission of the defendant's judgment of conviction for bank robbery in a case charging escape from federal custody was not necessary for the prosecution to prove its case); *see also* United States v. Yeagin, 927 F.2d 798, 802 (5th Cir. 1991) (reiterating the "general rule" but finding that it is not controlling because admission of evidence of the defendant's nine prior felonies was irrelevant to the issue being contested).

265. *See, e.g.*, United States v. Allen, 341 F.3d 870, 888 (9th Cir. 2003) (recognizing the limited nature of the holding in *Old Chief* and adopting the broad general principle reaffirmed in that case); *see also* United States v. Butler, 133 F. App'x 436, 438 (9th Cir. 2005) ("[I]n cases not involving a status conviction, the defendant may not stipulate away the ability of the prosecution to present its case; the prosecution may elect to prove its case by presenting a coherent narrative.").

266. *See* United States v. Chealy, 185 F. App'x 928, 934 (11th Cir. 2006) (explaining *Old Chief* did not apply because "[t]o the extent [defendant] argues that his offer to stipulate to his arrest removed any probative value from the March 4 drug transaction, his stipulation does not fall under [*Old Chief*,] which . . . held that it was an abuse of discretion [for the] prosecution to spurn a defendant's offer to stipulate to being a convicted felon in favor of admitting the entire record of the defendant's prior conviction, where the name and nature of the prior offense raises the risk of a verdict tainted by improper considerations and the evidence is solely to prove the element of prior conviction").

267. *See* United States v. Crowder, 141 F.3d 1202, 1209 (D.C. Cir. 1998) (en banc) ("[A] defendant's offer to stipulate to an element of an offense does not render the government's other crimes evidence inadmissible under Rule 404(b) to prove that element, even if the defendant's proposed stipulation is unequivocal, and even if the defendant agrees to a jury instruction of the sort mentioned in our earlier opinion.").

268. *Crowder*, 141 F.3d at 1210; *see also* United States v. Bowie, 232 F.3d 923, 932 (D.C. Cir. 2000) (citations omitted) ("Following the Supreme Court's lead in *Old Chief*, we reiterated that evidence may be relevant under the Federal Rules of Evidence whether or not the issue it related to is disputed. We concluded that offers to stipulate

Thus, the D.C. Circuit reversed its earlier, pre-*Old Chief* decision where it held exactly the opposite.

Thus, the predominant trend, after the Supreme Court's decision in *Old Chief*, is to move away from a rule that required the prosecution to accept a defendant's offer to stipulate in some instances, or at least left it to the trial court's discretion, to a general rule that the court cannot force the prosecution to accept a defendant's stipulation, with a very limited exception.[269] Some circuits recognize that an offer to stipulate can be considered as part of the Rule 403 balancing.[270] Thus, a defendant may be able to convince a district court to exclude the testimony under Rule 403, taking into consideration the offer to stipulate, even if he may not be able to convince the district court to require the prosecutor to accept the stipulation.

IV. SOCIAL SCIENCE AND RULE 404(B) ON INTENT

Having described the treatment of Federal Rule of Evidence Rule 404(b) offers of other acts evidence on the issue of intent in the federal courts, we can now turn to the empirical evidence presented by social science on the following issues: (1) is evidence of other similar crimes even logically relevant on the issue of intent, (2) how overwhelming is the unfair prejudice on the issue of propensity engendered by the admission of similar other acts evidence on intent, and (3) how effective are limiting instructions in ameliorating the overwhelming prejudice of exposing the jury to similar crimes evidence?

What does social science have to contribute to the discussion regarding the advisability of generally admitting similar act evidence against the criminal defendant? First, social science has now reached a consensus generally rejecting the logical relevance of offering prior similar acts to show that the defendant has the propensity to commit a criminal act or possesses the intent to do so. Second, irrespective of whatever marginal relevance exists in similar acts evidence, social science long ago agreed that overwhelming prejudice inheres in the admission of prior similar acts evidence before a jury and jurors usually misuse similar acts evidence for the forbidden purpose of finding criminal propensity. Third, social science has unequivocally demonstrated the utter futility of relying on limiting instructions to cure whatever error might occur in the admission of similar acts evidence.[271] Thus,

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may figure into the Rule 403 balancing, but cautioned that such offers are not determinative.").

269. This is exactly the outcome approved of in *Old Chief*.

270. *See supra* notes 204-26 and accompanying text.

271. This is especially troubling due to the inability of most jurors to properly weigh evidence of the defendant's prior actions against the facts in the current situation. *See* Todd A. Berger, *Politics, Psychology, and the Law: Why Modern Psychology Dictates an*

in short, social science has destroyed the three pillars that have been used to support the admission of similar act evidence: (1) that such evidence is logically relevant because a single similar act demonstrates a trait that tends to show a person acts in conformity therewith (vis-à-vis intent), (2) that the prejudice of admitting such evidence is generally substantially outweighed by unfair prejudice, and (3) that limiting instructions by the court generally can reduce the prejudice to an acceptable level.

In his recent review of the social science of personality in the context of similar acts evidence, Professor Imwinkelreid has demonstrated that pure "trait theory," the notion that people possess immutable traits governing their actions irrespective of context and circumstances, the sole foundation for the liberal admissibility of similar acts evidence, has been discredited and is now rejected by most social scientists in favor of a more nuanced approach.[272] In order to accept the logical relevance of similar crimes evidence for the purpose of demonstrating intent in criminal cases, one must believe that *simply* because a person possessed a particular intent on one occasion in the past, such person possessed the same intent in a subsequent, factually unrelated situation. That is, one must accept without qualification, that all persons possess certain inherent personality traits that permit the reasonable inference for the prediction of later behavior from past acts, i.e. that these traits are "relatively stable and enduring predispositions which exert sufficient influence to produce generally consistent behavior across widely divergent situations."[273] That is, if John Doe possessed the intent to kill his wife in a jealous rage in 2000, he would likely possess the intent to kill a police officer in 2011 who shoots at him while interrupting a robbery occasioned by John Doe's desperate economic situation.

A. TRAIT THEORY/RELEVANCE

Trait theory, as of the mid-twentieth century, is largely discredited and has been generally rejected based on the failure of studies to confirm the hypothesis regarding predictive behavior.[274] Trait theory as the sole or key determinant of the future behavior assumption not

Overhaul of Federal Rule of Evidence 609, 13 U. PA. J. L. & SOC. CHANGE 203, 207 (2009-2010) ("[W]hen interpreting other people's behavior, humans very often overestimate the importance of fundamental character traits and underestimate the importance of situation and context.").

272. *See* Imwinkelried, *supra* note 5, at 752-55.

273. *See* Berger, *supra* note 271, at 207 (noting the drafters of Rule 609, in logic analogous to that used by the drafters of Rule 404, "assumed that a person's character remains constant and unaffected by the environment in which he or she is acting").

274. Miguel A. Mendez, *The Law of Evidence and the Search for a Stable Personality*, 45 EMORY L.J. 221, 226-27 (1996).

only fails to take into account the specific circumstances of the event but more importantly ignores and defies the nearly universal modern view of human personality, which holds that people's acts are largely situational and significantly contextual.[275] Subsequent empirical research into the trait theory and personality generally showed that behavior is largely shaped by specific situational factors—factors that do not lend themselves to steady predictions about an individual's behavior.[276] Accordingly, "[a]ny specific action is a product of innumerable determinants, not only of traits but of momentary pressures and specialized influences . . . ."[277]

The prevailing modern social science views on personality, Interactionism, and Situationism are more nuanced than trait theory and are specific to a particular individual and situation.[278] While no one *now* subscribes to an unadulterated trait theory, the contemporary and generally accepted views deal with how personality traits and external factors interact. Interactionism, for one, holds that both personality and situation play important roles in causing human behavior. There is general agreement that behavior is influenced by one's environment.[279] Situationism also looks to the *details* and *context* of the individual's prior behavior before merely deeming it a personality trait.

Under the discredited trait theory, the fact that an individual previously robbed X should be admitted under 404(b) in a subsequent trial for robbery of Y on the issue of intent to rob. The situational factors, namely, that the victim in the first instance was vulnerable, that there were no police officers in sight, that the "robber" had just been evicted, and that he had four children to feed, however, are ignored in assessing his probability to commit a similar crime.[280] To state an individual is disposed to a certain action, say murder, rejects all rules of science and common sense.[281]

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275. *See* Imwinkelried, *supra* note 5, at 748 (describing how trait theory has been particularly discounted in situations where a person's general character was inferred from a small sample size of behaviors).

276. Mendez, *supra* note 274, at 228.

277. Douglas T. Kenrick & Arther Dantchik, *Interactionism, Ideographics and the Social Psychological Invasion of Personality*, 51 J. PERSONALITY 286, 292 (1983); *see also* Imwinkelried, *supra* note 5, at 748 (noting empirical studies have discounted trait theory by showing a total lack of cross-situational consistency).

278. Donald A. Dripps, *Fundamental Retribution Error: Criminal Justice and the Social Psychology of Blame*, 56 VAND. L. REV. 1383, 1395 (2003) (explaining the Interactionism Theory).

279. *Id.*; *see also* Andrew E. Lelling, *A Psychological Critique of Character-Based Theories of Criminal Excuse*, 49 SYRACUSE L. REV. 35, 86-87 (1998).

280. Dripps, *supra* note 278, at 1395-96.

281. M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 333 (1956).

Most social scientists, agree that it is impossible to infer intent from one crime to another absent some inextricable link between them, which would be another independent non-intent purpose for admitting Rule 404(b) acts.[282] Making any correlation between past behavior or intent and future behavior or intent requires a significant expert psychological study of the person involved and the specifics of the situation in order to more specifically define behavior dispositions.[283] Clearly, simply demonstrating the defendant has, in the past, had the intent to kill by offering similar crimes evidence under 404(b) does not qualify as an expert psychological study. The practice of admitting such evidence continues to rest solely on the archaic "trait theory" and fails as a matter of logical relevance.

In fact, not even trait psychologists "ever seriously argued that personality characteristics manifested themselves without regard to the appropriateness of the situation."[284] That is, they agreed that a trait "inferred from[ ] the repeated occurrence of actions have the *same significance* . . . to a definable range of stimuli having the same personal significance . . . ."[285] More modern views suggest that personality factors and situational factors taken alone are insufficient in predicting behavior.[286] One prominent social scientist, Walter Mischel, posited that what allows for predictions of future behavior are the differences in how individuals perceive situations.[287] In a non-exhaustive list, he named several factors that play a significant role in "predicting" future behavior:

> (1) encodings (personal beliefs) about the self, other people, events, and situations (external and internal); (2) expectancies and beliefs about the social world, about outcomes for behavior in particular situations, and about self-efficacy; (3)

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282. *See* David M. Dunkley, David C. Zuroff & Kirk R. Blankstein, *Self-Critical Perfectionism and Daily Affect: Dispositional and Situational Influences on Stress and Coping*, 84 J. PERSONALITY & SOC. PSYCHOL. 234, 247 (2003) (describing the need to aggregate a long history of a person's behavior in order to have any meaningful predictive power for their future actions); Imwinkelried, *supra* note 5, at 753 (describing how even by the most optimistic estimations a single prior act has relatively little predictive power of a future act); Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 782 (1975) (describing how the majority of social scientists now reject trait theory and the logic that underpins this type of inference).

283. Mendez, *supra* note 274, at 236; *see* Imwinkelried, *supra* note 5, at 761 (footnotes omitted) (explaining the modern view that in order make inferences about a person's future behavior it is essential to "aggregate repeated observations of the person's conduct, ideally over a long stretch of time").

284. Kenrick & Dantchik, *supra* note 277, at 292.

285. *Id.*

286. *Id.* at 302.

287. Walter Mischel & Yuichi Shoda, *A Cognitive-Affective System Theory of Personality: Reconceptualizing Situations, Dispositions, Dynamics, and Invariance in Personality Structure*, 102 PSYCHOL. REV. 246, 253 (1995).

> affects, such as feelings and emotional responses (including physiological reactions); (4) goals and values, including life projects; and (5) competencies, plans, and strategies for self-regulation at the action level."[288]

These findings suggest that nuances and individuality associated with personality, specifically in relation to situational circumstances, weighs strongly against character-based theories of culpability.[289]

Modern approaches such as Situationism and Interactionism highlight the inefficiencies of personality and dispositions as predictors of future conduct. Research shows that "[a]lthough people tend to attribute their own misconduct to external constraints, they tend to attribute the behavior of others to personality rather than context."[290] Psychological research on this topic supports two general findings: (1) individual responses are reasonably consistent over time given specific situations, but (2) individual behavior is not consistent across all situations.[291] That is, there is very little consistency in trait-related behavior from one situation to another.[292] Thus, presentation of character evidence again ignores the overriding importance of the specifics and circumstances.

This tendency to strictly associate behavior with personality is referred to as fundamental attribution error ("FAE"),[293] proof of which psychologists regard as firmly established. Research suggests there is a strong likelihood that most people, including decision makers, overestimate the causal significance of personal choice and, accordingly, underestimate the casual significance of situational factors in the behavior of others.[294] An onlooker will likely determine the individual, not the situation, is responsible for the action, i.e. that he chose the action not based on the situation or circumstances but because of the type of person he is (a clear propensity inference).[295] FAE sheds light on why we seem to underestimate and undervalue the power of situations.[296]

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288. Mendez, *supra* note 274, at 232-33 (citing Mischel & Shoda, *supra* note 287, at 253).

289. Lelling, *supra* note 279, at 37.

290. Dripps, *supra* note 278, at 1388.

291. *See* Imwinkelried, *supra* note 5, at 749 (describing how experiments have shown that the particular situation controls an individual's behavior and that there is little cross situational consistency).

292. *Id.*

293. Dripps, *supra* note 278, at 1388.

294. Lelling, *supra* note 279, at 41-65.

295. *See* Berger, *supra* note 271, at 207-08 (describing the tendency of individuals to make FAE in their daily lives).

296. *Id.* at 208-09 (describing a disturbing psychological experiment in which "normal and healthy young men" were divided into groups of "prisoners" and "guards" and told to act the way a person in their situation would act; the experimenter had to termi-

Overall, FAE has two implications on the legal decision making process and the underlying policies for the development of evidentiary rules, specifically related to character evidence—the cognitive tendency to completely blame individuals, rather than situations, for outcomes and, more distinctly, to infer that these cognitive tendencies are immune from any form of correction.[297] These two implications lead to the conclusion that FAE guides individuals to find *someone* responsible when harm occurs.

Studies conducted related to the implications of FAE show that, even when the individuals involved (jurors, for example) were adequately informed that an actor's behavior was the result of context, *not personality*, they tended to attribute his actions to his personality.[298] In other words, the behavior is based on "something 'in' the actor, rather than in the circumstances."[299] Even when the facts clearly indicate the situation controlled the behavior, because of FAE, observers still turn to the accused personality. Based on these findings, FAE has an alarming affect on the presentation of specific act and other act evidence under 404(b).[300]

FAE highlights why, at best, the prevailing view of Rule 404(b) on intent is based on a straightforward propensity inference on intent, which is forbidden by both Rules 404(a) and (b).[301] This faulty view excludes all information aside from what the individual actually did in the past. In practice, this view invites the fact finder to determine the defendant has the propensity to intend to kill simply based on the fact he has shown that intent in the past. The allowance for other acts evidence does not provide an adequate basis for predicting how an in-

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nate the experiment after several days due to widespread and extreme abuse of the "prisoners" by the "guards").

297. Dripps developed his article around the thesis that the tendency of the observer to attribute conduct and its consequences to personality instead of situation has "important and disturbing implications" for criminal law, and he went on to examine several prominent rationales for law and punishment. Dripps, *supra* note 278, at 1385, 1389.

298. *Id.* at 1399.

299. NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 59 (2000).

300. *See* Norman J. Finkel, *Commonsense Justice, Psychology, and the Law: Prototypes that Are Common, Senseful, and Not*, 3 PSYCHOL. PUB. POL'Y & L. 461, 477-78 (1997) (noting jurors are surely subject to cognitive predispositions such as FAE). FAE can help to explain many of the similarly puzzling aspects of criminal law. Take, for example, the distinction in penalties for failed and successful criminal acts. Why does such a distinction exist? Perhaps lawmakers and jurors alike are consistently seeking to attribute failure and success to the actor, rather than to the circumstances which lead to the failure. These intuitive notions of blame tend to over assess individual's responsibility and, again, under assess the situational factors.

301. FED. R. EVID. 404(b) (providing "[e]vidence of other crimes, wrongs, or acts . . . may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity" but cannot be admitted for the purpose of proving propensity).

dividual will behave. Take, for example, an individual who was previously accused of child abuse.[302] While you may not want to hire that individual as a babysitter based on that accusation, does it logically follow that you would agree to convict that babysitter in a later child abuse case based on that first accusation?

Admitting similar acts evidence on intent actually runs counter to the justification for the admission of other acts evidence for other permissible non-propensity purposes. Significant other acts evidence can be admitted both because it is relevant and not overwhelmingly prejudicial. These offers, I submit, are appropriate offers under Rule 404(b). Consider motive and knowledge. To show that a defendant has committed a crime witnessed by the victim as evidence of the defendant's motive for killing the victim permits the jury to consider the other crime on motive without *having* to make any kind of propensity inference. Similarly, when the defendant's prior possession of a particular controlled substance is offered to prove the defendant's knowledge of that substance in the instant trial involving the charge of knowingly possessing that same substance (particularly where the defendant denies such knowledge), the jury can logically infer knowledge without *having* to infer propensity.

Thus, as pointed out by several courts of appeals, 404(b) should never allow the admittance of other acts evidence to prove intent unless, and only unless, the government can show that the inference is completely independent of a propensity inference or requirement. Seemingly, the government must distinguish between evidence used to prove a defendant's intent, which is admissible, as opposed to evidence used to prove a defendant acted in conformity with those prior acts, which is not admissible since it would violate the ban on admission of propensity evidence. As various courts have interpreted this balancing act in different ways, the prevailing standard remains somewhat hazy.[303]

What is clear, however, is that the introduction of other acts evidence, specifically to prove intent under 404(b), is based on the archaic trait theory, which ignores situational contexts and invites observers (namely, the jurors) to overestimate the extent to which a prior action correlates with a present one. Accordingly, "[a]llowing evidence that looks, feels, and smells like character evidence to be received under the rubric that it is being offered for a relevant non-character purpose tests the outer limits" of an individual's ability to comprehend.[304]

302. Miguel A. Mendez, *Character Evidence Reconsidered: "People Do Not Seem to be Predictable Characters,"* 49 HASTINGS L.J. 871, 873 (1998).

303. Richard B. Kuhns, *The Propensity to Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777, 777-78 (1981).

304. Mendez, *supra* note 302, at 872.

Several staged studies have indicated that unfavorable character evidence, such as 404(b) intent evidence, is "more salient and has a greater impact on jurors than . . . favorable character evidence does."[305] Recognizing that all experimental studies of this sort contain certain errors, each indicated that within the constraints of the given investigations, it was the valence of the information itself that was much more important to the jurors than the actual timing, source, or context of the information.[306] It logically follows that regardless of the planned nature of the investigations, the actual character evidence was itself the prime determinant for the jurors.[307]

One study examined whether introduction of character evidence related to a defendant's prior conviction for a similar crime significantly influenced mock jurors' individual verdicts.[308] The study examined six crimes: shoplifting, attempted rape, theft, robbery, prostitution, and child molestation.[309] With regard to each crime, the study tested whether the jurors' own feelings about the defendant's credibility and propensity had any mediating impact on their knowledge and use of the information related to his prior conviction.[310] In all six cases, propensity attributions were a significant or partial mediator while credibility rarely had such an effect.[311] This means that the introduction of a defendant's prior criminal acts as other act evidence greatly increased the odds of his conviction in the similar offense at hand. In sum, "the fact that attributions of propensity commonly served to mediate the impact of defendant's prior conviction on the verdict clearly suggest that jurors do not use such evidence in a legally appropriate manner, such as to assess his credibility, but rather to attribute criminal propensity to the defendant."[312]

This path of thought is reminiscent of recidivism studies. Proponents for the continued use of 404(b) argue that "recidivism, data . . . at a minimum shows that someone who has been convicted and imprisoned for criminal offense is many times more likely to commit a

305. Michael Lupfer, Robert Cohen, J.L. Bernard & Dale Smalley, *Presenting Favorable & Unfavorable Character Evidence to Juries*, 10 LAW & PSYCHOL. REV. 59, 67 (1986).

306. *Id.* at 70.

307. *See id.* at 71 ("Negative character evidence is likely to harm a defendant's case, whatever the source, and researchers have failed to identify a reliable strategy for minimizing its damaging effects.").

308. Diana R. Grant, From Prior Record to Current Verdict: How Character Evidence Affects Jurors' Decisions (1996) (unpublished Ph.D. dissertation, University of California, Irvine) (on file with author).

309. *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

similar offense than a person chosen at random."[313] Recidivism is a person's tendency to repeat an undesirable behavior after he has either experienced negative consequences of that behavior or has been treated or trained to extinguish that behavior.[314] It is also known as the percentage of former prisoners who are rearrested.[315] What this argument fails to take into account is that the question here is not how much more likely the accused is to commit a similar crime in comparison to a random individual, but how much more likely he is to commit crime X because he committed crime X before.[316] Furthermore, these same studies show that the comparative propensity decreases over time, and they acknowledge that the statistics associated with many recidivist studies ignore situational variance.[317] "When trying to predict whether a particular offender will re-offend, [or in this case, be disposed to the same trait,] we are projecting onto a blank slate."[318] Aside from the other act or specific incident, we have no other information to inform the decision making process.

FAE explains that people systematically underestimate the levels of influence that external factors have on behavior and instead attribute a person's actions primarily to his disposition.[319] Most recently, one group has argued that behavior should be understood as a product of both person and environment.[320] In a 2006 article, author Charles H. Rose explored two classic issues against the use of character evidence generally and within the context of how it related to defendants accused of sexual crimes.[321] Character evidence "empowers the jury to potentially consider who a person is [or was based on prior acts], as opposed to what they have done."[322] Where there is little context, such as the situational considerations of a past action, jurors lack the ability to accurately determine intent and, instead, use the information to assess blame.

In the American legal system, we presume that jurors act rationally, follow the law, and suspend determinations until all the evidence

313. Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 721-22 (1998).

314. JAMES M. HENSIL, SOCIAL PROBLEMS: A DOWN-TO-EARTH APPROACH (8th ed. 2008).

315. *Id.*

316. Mendez, *supra* note 302, at 874.

317. Mike Redmayne, *The Relevance of Bad Character*, 61 CAMBRIDGE L. J. 684, 696-97 (2002).

318. *Id.* at 692.

319. Dripps, *supra* note 278, at 1395-97.

320. *Id.*

321. Charles H. Rose III, *Caging the Beast: Formulating Effective, Evidentiary Rules to Deal with Sexual Offenders*, 34 AM. J. CRIM. L. 1 (2006).

322. *Id.* at 7.

has been provided.[323] How well this is accomplished is greatly dependent upon the judge's instructions, how well the jurors understand them, and, most importantly, how well the jurors adhere to them.[324] Many of these studies revealed that jury instructions regarding the appropriate use of prior convictions or other acts evidence had no significant impact on their verdicts.[325]

Though, for period of time, many social scientists known as "situationalists" utterly rejected any role for "character traits" in making personality determinations and predicting behavior, the current and now long-standing consensus known as interactionism holds that character traits play a limited role in predicting behavior. This theory, however, requires that circumstances be factored in to any calculus of the likelihood that a person who commits a single or several criminal acts is more likely to commit such acts or harbor a similar intent in the future. Indeed, social scientists now agree that personality analysis, which would be useful to a jury exposed to similar acts evidence, would require the application of expert testimony to measure the impact of trait, circumstance, and other factors on the particular defendant involved by a metric that has not yet been discovered. Expert testimony, therefore, could provide logically relevant meaning to the consideration of other acts evidence on propensity to act or intent.

Needless to say, no such evidence has ever been offered in an American courtroom, and given the ongoing nature of studies to establish the precise relationship of trait and circumstantial matters, such evidence is not presently available and will not be readily or practically available in the future. Yet, courts persist in routinely admitting unadorned and unexplained prior similar act evidence in criminal cases, routinely ruling on appeal that even if the admission of the evidence was erroneous, limiting instructions cure the problem of admitting logically irrelevant and overwhelmingly prejudicial evidence.[326]

323. Jerry I. Shaw and Paul Skolnick, *Effects of Prohibiting and Informative Judicial Instructions on Jury Decision Making*, 23 SOC. BEHAVIOR & PERSONALITY 319, 319 (1995).

324. *Id.*

325. Rachel K. Cush & Jane Goodman Delahunty, *The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence*, 13 PSYCHIATRY, PSYCHOL. & L., 110, 113 (2006); Joel D. Lieberman & Jamie Arndt, *Understanding the Limits of Limiting Instructions: Social Psychological Explanations for the Failures of Instructions to Disregard Pretrial Publicity and Other Inadmissible Evidence*, 6 PSYCHOL. PUB. POL'Y & L. 677, 686-87 (2000).

326. *See infra* notes 350-63 and accompanying text.

B. PREJUDICE

Even if we assume that there is some, even marginal, logical relevance in the admission of other similar acts evidence on the issue of intent, social science studies of the impact of negative character evidence admitted to impeach the credibility of the criminal defendant demonstrate the enormous prejudice generated by the jury's exposure to other crimes evidence. This prejudice, unfortunately, cannot be cured by the most careful of limiting instructions. Indeed, it is worth remembering that evidence admitted solely to impeach the criminal defendant is not even "offered for its substantive truth" but "merely" to impeach the credibility of the defendant, while other crimes evidence offered to show intent pursuant to Rule 404(b) is admitted substantively, generally in the government's case-in-chief, with no limitation as to its use for impeachment.

Thus, the federal court's treatment of a prosecutor's impeachment of the defendant's credibility by using prior convictions for crimes similar to the charged offense is instructive. First, recognizing the extraordinary prejudice to the criminal defendant inherent in permitting the jury to hear and consider the prior criminal convictions of the defendant-witness, the rulemakers reversed the usual relevance/prejudice test to favor exclusion of the prior conviction impeachment of the defendant.[327] Where the prior conviction is admissible against any other witness in the criminal trial if its probative value on credibility is not substantially outweighed by the danger of unfair prejudice, the conviction is admissible only to impeach the criminal defendant where its probative value on truth telling substantially outweighs the danger of unfair prejudice.[328] Thus, the Rules tilt heavily

327. FED. R. EVID. 609 advisory committee's note.

> The . . . change effected by the amendment resolves an ambiguity as to the relationship of Rules 609 and 403 with respect to impeachment of witnesses other than the criminal defendant. The amendment does not disturb the special balancing test for the criminal defendant who chooses to testify. Thus, the rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk or prejudice—i.e., the danger that convictions that would be excluded under Fed.R.Evid. 404 will be misused by the jury as propensity evidence despite their introduction solely for impeachment purposes. Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.

Id. (citation omitted).

328. Despite the application of the special balancing test for testifying criminal defendants, it is not unusual for courts to admit prior convictions (including convictions for similar crimes) of the accused when he or she testifies. Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1356-57 (2009).

(at least in theory) against admitting prior convictions to impeach a criminal defendant's credibility.[329]

Second, the judicial interpretation of Rule 609 (prior conviction impeachment of criminal defendants) disfavors the use of acts similar to the charged offense to impeach the defendant. Appellate court decisions generally recognize that the similarity between the prior conviction and the charged offense is a factor that cuts against admissibility because it invites the jury to make an impermissible inference that the defendant possesses the propensity to commit such crimes rather than the permissible, albeit weak, inference that the prior conviction indicates a propensity to lie as a witness.[330] As the United States Court of Appeals for the Fourth Circuit stated:

> Admission of evidence of a similar offense often does little to impeach the credibility of a testifying defendant while un-

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329. Federal Rule of Evidence 609(a) provides the following:

> (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and
>
> (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

FED. R. EVID. 609(a). Note Rule 609(a)(2), which automatically admits convictions for crimes of dishonesty to impeach, makes no distinction between testifying criminal defendants and other witnesses.

330. *See, e.g.*, United Sates v. Montgomery, 390 F.3d 1013, 1016 (7th Cir. 2004) (finding the district court did not abuse its discretion in allowing Montgomery's prior convictions to be admitted); United States v. Toney, 27 F.3d 1245, 1254 (7th Cir. 1994) (alteration in original) (citing United States v. Rein, 848 F.2d 777, 783 (7th Cir. 1988)) (quoting United States v. Fountain, 642 F.2d 1083, 1091 (7th Cir. 1981)) ("The danger of admitting evidence of a defendant's prior conviction for a similar offense is that the 'jury will regard past convictions of similar crimes as evidence of . . . a willingness to commit the crime charged.'"); United Sates v. Causey, 9 F.3d 1341, 1344-45 (7th Cir. 1993) (stating that allowing Causey's prior convictions for purposes of impeachment was not outside the scope of the court's reasonable discretion); United States v. Wallace, 848 F.2d 1464, 1473 (9th Cir. 1988) ("[T]he district court incorrectly assumed that the similarity of the prior conviction and the present charges weighed in favor of admissibility."); United States v. Hans, 738 F.2d 88, 93-94 (3d Cir. 1988) (stating the district court was correct in not admitting a prior assault conviction because it was too similar to the present charge of assault); United States v. Jackson, 627 F.2d 1198, 1210 (D.C. Cir. 1980) (stating the dissimilarity between the prior crime and the crime charged reduced the risk of unfair prejudice); United States v. Barnes, 622 F.2d 107, 108-09 (5th Cir. 1980) (maintaining the trial court did not abuse its discretion because the case at issue was not similar to the prior conviction); United States v. Poteet, 573 F.2d 351, 353 (5th Cir. 1978) (noting Fifth Circuit precedent rejected the use of prior crime impeachment with virtually identical issues, evidence, and factual circumstances); United States v. Puco, 453 F.2d 539, 541-42 (2d Cir. 1971) (holding the trial court abused its discretion by allowing the defendant's prior conviction to be used for impeachment).

> doubtedly prejudicing him. The jury, despite limiting instructions, can hardly avoid drawing the inference that the past conviction suggests some probability that defendant committed the similar offense for which he is currently charged. The generally accepted view, therefore, is that evidence of similar offenses for impeachment purposes under Rule 609 should be admitted sparingly if at all.[331]

Third, all of the major modern Evidence treatise commentators agree that the correct and prevailing federal view is that there is no flat bar to the admission of similar prior conviction evidence to impeach the defendant, but the similarity of the prior conviction to the charged offense weighs significantly against admission.[332]

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331. United States v. Sanders, 964 F.2d 295, 298 (4th Cir. 1992).

332. In *Weinstein's Federal Evidence*, the author simply stated the current law as follows:

> When a prior crime committed by the accused is similar to the one with which the accused is charged, the prejudicial effect of a prior conviction admitted for impeachment may well outweigh its probative value. Consequently, prior convictions for the same or similar crimes are admitted sparingly.
>
> However, a prior conviction for a similar crime may be admitted if, after consideration of the other factors, its probative value outweighs its prejudicial effect. On the other hand, if the prior conviction is dissimilar to the charged crime, this factor favors admission of the conviction.

4 JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 609.05[3][d] (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2006) (footnotes omitted).

In Saltzburg's treatise, the authors pointed out that Rule 609 is more protective of defendants than Rule 403. 3 STEPHEN A. SALTZBURG, MICHAEL M. MARTIN & DANIEL J. CAPRA, FEDERAL RULES OF EVIDENCE MANUAL § 609.02[7] (9th ed. 2006). The authors also suggested the strategy for a defendant to exclude the prior convictions, but the authors seemed not to be optimistic about the exclusion because they used the language "stand a chance." *Id.*

> Rule 609(a)(1) provides a special balancing test when the criminal defendant is the witness. The prosecution must show that the probative value of the conviction outweighs the prejudicial effect that the accused will suffer when the jury hears about the conviction. This is more protective of defendants than the Rule 403 test, under which the prejudicial effect must substantially outweigh the probative value for the evidence to be excluded. As a practical matter this means that a defendant's convictions *stand a chance* of exclusion when: (1) they are similar to the crime with which the defendant is charged; (2) they are particularly inflammatory; or (3) the defendant has been impeached in other ways, such as with inconsistent statements or with convictions that are automatically admitted under Rule 609(a)(2).

Id. (emphasis added).

Finally, in Mueller and Kirkpatrick's treatise, the authors seemed to be the most critical of the admission of prior conviction for impeachment purpose. The authors also suggested that some limiting measures, such as the non-disclosure of the nature of the crime, "make[ ] little sense."

> When the accused is a witness, the closer the resemblance between the charged crime and the crime leading to the prior conviction offered, the greater the potential prejudice to the defendant. In *Gordon*, the court said that prior convictions for the same crime "should be admitted sparingly," suggesting that court might limit the impeachment by similar crimes to a "single conviction."
>
> Of course some kinds of resemblance between the prior offense and the charged offense justify admitting evidence of the former on such points as

Finally, social science research clearly demonstrates the significant, perhaps overwhelming, prejudicial impact of prior conviction impeachment, which cannot be ameliorated by limiting instructions. Some have suggested that some limiting measures, such as the nondisclosure of the nature of the crime, "make[ ] little sense."[333]

V. THE LEGAL AND SOCIAL SCIENCE STUDIES

Both empirical and theoretical studies suggest that a defendant is more likely to be found guilty when the jury knows of his or her criminal record. A defendant with a record is therefore more reluctant to testify on his or her own behalf. Psychological studies suggest that fact finders (including the jury and experts) tend to make decisions based on the defendant's character, not the facts surrounding the case. These studies also tend to discredit the rationales that justify the admission of prior crimes, especially similar crimes, as evidence. Studies suggest that the introduction of prior criminal acts is not a sound reason to challenge the defendant's credibility. Also, the mitigating effects of a limiting jury instruction are likely illusory, and sometimes, the limiting instruction even makes the defendant's case worse.

A. Conviction Rate

The empirical studies based on the real trial data and the mock trial data suggest that a jury with knowledge of the defendant's prior crimes, regardless of the similarity between the current charge and previous crimes, is more likely to deliver a guilty verdict when the evidence is weak. This knowledge, however, has no significant impact on the jury's decision when the evidence is strong.

In one study based on real trials, the researchers collected data from 300 criminal trials in four counties.[334] The researchers found

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knowledge, motive, intent, and so forth under Fed. R. Evid. 404(b), and conviction may become relevant to contradict the defendant's testimony and may be admitted for this purpose despite a close resemblance to the charged crime, but a crime may easily lead to conviction for the same criminal offense without being sufficiently relevant on some particular point to be admissible substantively, and then use of the conviction to impeach the defendant introduces precisely the risk of prejudice that is the concern of Fed. R. Evid. 609(a)(1), and for that matter the concern as well of Fed. R. Evid. 403 and 404, although this factor is not always decisive and sometimes other factors lead to admitting even convictions for similar crimes. Occasionally such similar convictions are admitted without disclosing their nature to the jury, which *makes little sense* inasmuch as this information is crucial in trying to assess the probative worth of the prior conviction itself.

3 Christopher. B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 6:45(3) (3d ed. 2007) (emphasis added) (footnotes omitted).

333. Mueller & Kirkpatrick, *supra* note 332, § 6:45(3).

334. Eisenberg & Hans, *supra* note 328, at 1353.

that, if a defendant with a prior record testified, the jury was more likely to know his or her criminal record.[335] The jury's knowledge of the prior conviction had a strong impact on a conviction based on weak evidence.[336] When the evidence strength was less than 3.5,[337] the jury convicted the defendant in 43% of the cases where the jury knew about the prior conviction, compared to 18% where the jury did not know.[338] By contrast, when the evidence strength was greater than 3.5, the jury convicted the defendant in 91% of the cases where the jury did not know the record, compared to 93% where the jury knew the record. There is no statistical difference between these two rates.[339]

Mock trial experiments reached similar conclusions. In one study, the researchers compared jury verdicts between juries having the defendant's criminal record and juries without the record and found that the juries with the record were more likely to convict the defendant.[340] As to evidence strength, in a study involving inadmissible hearsay evidence, the researchers found inadmissible evidence had a significant impact when the evidence was weak but not when the evidence was strong.[341]

These studies did not evaluate the effects of (1) the similarity between the prior crimes and the current charge or (2) the nature of the previous crime. The following section will discuss the effects of similar crimes. As to the effect of the nature of the previous crime, a study suggests that the jury is more inclined to convict a defendant when the prior crime is more serious.[342] In that study, mock jurors with prior experience on a rape case voted to convict a defendant in a vandalism case at a significantly higher rate than did jurors without such experience. Mock jurors with prior experience on a vandalism case, however, voted to convict a defendant in a rape case at a significantly lower rate than jurors without such experience.[343]

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335. *Id.*

336. *Id.*

337. The strength is measured base on a seven-point Likert Scale, with seven being the strongest and one being the weakest. *Id.* at 1367.

338. *Id.* at 1385 tbl.10.

339. *Id.*

340. Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. LAW Q. 235, 242 (1975).

341. Stanley Sue, Ronald E. Smith & Cathy Caldwell, *Effects of Inadmissible Evidence on the Decisions of Simulated Jurors: A Moral Dilemma*, 3 J. APPLIED SOC. PSYCHOL. 345 (1973).

342. Dennis H. Nagao & James H. Davis, *The Effects of Prior Experience on Mock Juror Case Judgments*, 43 SOC. PSYCHOL. Q. 190, 196-97 (1980).

343. *Id.* at 196-97.

B. SIMILAR PREVIOUS CRIMES AND CREDIBILITY

The rationale to admit prior similar crime evidence under Federal Rule of Evidence Rule 609(a), namely, to challenge the credibility of the witness, is not supported by researchers' results. If the rationale were valid, one would expect the impeachment by a prior conviction for a crime of dishonesty to have a stronger impact on the credibility of the defendant than any other conviction. In one mock trial study, however, researchers tested jurors with impeachment by conviction of the same crime as that charged against impeachment by conviction of perjury.[344] The research showed that although prior conviction impeachment generally had little impact on the defendant's credibility (because jurors generally have a low regard for the defendant's credibility), the impact of the similar crime impeachment had a much greater impact on finding the defendant guilty than even the perjury conviction.[345] In another research study, after applying mock trial data in a mathematic model, the researchers suggested that when a similar offense is offered as evidence, the standard to find the defendant guilty is lower compared to when a dissimilar offense or no offense is presented as evidence.[346]

Generally, with regard to the defendant's credibility, whether the prior crimes were similar to the currently charged crime did not cause a difference between the jury with the defendant's prior criminal record and the jury without the record.[347] This seems to suggest that introduction of a prior crime has no effect on the evaluation of the defendant's credibility.

In a study less relevant to the effect of prior crimes, researchers conducted experiments on the effects of a joint trial for similar crimes.[348] The results support the conclusion that knowledge of other similar crimes increases the probability that a defendant will be convicted.[349] When two similar cases, with one and the same defendant, are joined in one trial, the first of these cases is evaluated differently than the same case presented alone, as severed. The first case in the joined trial consistently receives higher guilt scores than that same

344. Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence to Decide on Guilt*, 9 LAW & HUM. BEHAV. 37 (1985).

345. *Id.* at 42-43

346. Ewart A.C. Thomas & Anthony Hogue, *Apparent Weight of Evidence, Decision Criteria, and Confidence Ratings in Juror Decision Making*, 83 PSYCHOL. REV. 442, 455-56 (1976).

347. Hans & Doob, *supra* note 340, at 247.

348. Irwin A. Horowitz, Kenneth S. Bordens & Marc S. Feldman, *A Comparison of Verdicts Obtained in Severed and Joined Criminal Trials*, 10 J. APPLIED SOC. PSYCHOL. 444 (1980).

349. *Id.* at 454.

case when tried separately, as severed. The second case in the joined trial does not receive higher guilt scores than its severed counterpart.

C. The Effects of a Limiting Jury Instruction

Courts usually are satisfied that a limiting jury instruction would mitigate the unfair prejudice effect brought by prior crime evidence.[350] Empirical studies, however, do not support this rationale. In fact, sometimes, a limiting jury instruction could create more harm to the defendant.

The underlying assumption supporting the effectiveness of limiting instructions is that juries are able to either disregard or selectively apply information after they hear it.[351] A large body of research undercuts this baseline assumption.[352] Specifically, in one experiment, the mock jurors were given an instruction to ignore the previous record.[353] The failure of the jurors to comply with the instruction suggested that the judge's limiting instruction would probably have little effect with respect to the bias against the defendant.[354]

In another study, the researchers applied mock jury data to a jury-decision model.[355] The researchers found that the judge's instruction requiring the jury to disregard the similar prior offense record had little effect as to the standard for a jury to find a defendant guilty.[356]

A limiting jury instruction could actually increase the prejudicial effect of unfavorable evidence against the defendant by causing jurors to increase their focus on that evidence.[357] In one study, when evidence was simply ruled inadmissible, it had little effect on the guilt judgments.[358] However, when the judge specifically admonished the jurors to disregard the inadmissible testimony, their verdicts were influenced in the direction of that testimony.[359] The researchers suggested that this might be due to "the arousal of psychological

350. *E.g.*, Carter v. Kentucky, 450 U.S. 288, 294-98 (1981).

351. Nancy Steblay et al., *The Impact on Juror Verdicts of Judicial Instruction to Disregard Inadmissible Evidence: A Meta-Analysis*, 30 Law & Hum. Behav. 469, 470 (2006).

352. Cush & Delahunty, *supra* note 325, at 113; Lieberman & Arndt, *supra* note 325, at 680-82.

353. Hans & Doob, *supra* note 340, at 251.

354. *Id.*

355. Thomas & Hogue, *supra* note 346, at 442-44.

356. *Id.*

357. Cush & Delahunty, *supra* note 325, at 192; Lieberman & Arndt, *supra* note 325, at 677-79 (describing this so-called "backfire effect").

358. Sharon Wolf & David A. Montgomery, *Effects of Inadmissible Evidence and Level of Judicial Admonishment to Disregard on the Judgments of Mock Jurors*, 7 J. Applied Soc. Psychol. 205 (1977).

359. *Id.*

reactance in their Inadmissible conditions."[360] Although this study is not based on prior conviction evidence, it nonetheless lends support to the notion that a limiting jury instruction is probably futile in mitigating the prejudicial effect of prior crimes evidence.

Beyond the raw data indicating that limiting instructions are often ineffective, there are a number of explanations that illuminate the reason for this inefficacy. The most basic is that jurors fail to understand a judge's instructions.[361] Another theory suggests that jurors comprehend limiting instructions but ignore them in favor of their own sense of fairness.[362] There are also a number of more complicated psychological theories that may provide explanations as to why limiting instructions are often ineffective.[363] The overall trend of social science is clear, however, as there are many factors at play that demonstrate the ineffectiveness of limiting instructions.

D. Decision Making Relying on Character (Similar Crimes)

The complexity of decision making by jurors may cause the jurors to make decisions based on character, which in turn is strongly influenced by similar prior conduct. Jurors usually made decisions under uncertain conditions based on their intuitive, common-sense judgments departing from the actual probabilities. To reduce the complexity of information that must be integrated to yield a decision, jurors use simplifying operations, called "heuristics," which often lead to errors in judgment.[364]

> When two events, A and B, are presented to jurors, they assess the likelihood that event A causes or is associated with event B by the degree to which A is representative of B, or in other words, the degree to which A resembles B. . . . This assessment invariably leads to the inference that A and B are connected probabilistically simply because they bear some re-

360. *Id.* at 216.

361. David R. Shaffer & Shannon R. Wheatman, *Does Personality Influence Reactions to Judicial Instructions? Some Preliminary Findings and Possible Implications*, 6 Psychol. Pub. Pol'y & L. 655, 656 (2000).

362. Lieberman & Arndt, *supra* note 325, at 692-93; *see* Shaffer & Wheatman, *supra* note 361, at 656 (labeling this phenomenon "commonsense justice").

363. *See* Lieberman & Arndt, *supra* note 325, at 691-700 (describing "reactance theory," in which individuals see judicial limiting instructions as a threat against their ability to partake in "free behaviors" and rebel against this limitation; the "belief perseverance" theory, in which once a person forms an opinion it is difficult for them to change their mind, even in the face of a conflicting limiting instruction; and the "ironic mental processes" theory, which explains the effect on the conscious and unconscious brain processes of trying to suppress information); *see also* Cush & Delahunty, *supra* note 325, at 113 (positing general bias in the learning of information that takes place during a trial as an explanation for the ineffectiveness of limiting instructions).

364. Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 Law & Soc'y Rev. 123, 127 (1980-1981).

> semblance[, i.e., *similarity*,] to each other in terms of their descriptive features.[365]

"The judgment of covariation between the two events is determined simply by the stereotypic association between these two events. The stronger the assumed association between the two, the more likely it is judged that they will co-occur."[366] Needless to say, decisions based on such strategy are prone to error "because similarity is not influenced by facts that should affect probability judgments."[367]

People tend to have more confidence in their "intuitive predictions by selecting the outcome that is more *similar* to their stereotype. . . . Given a brief personality description, people rely on their stereotypes, or implicit personality theory, and go from the description-however scanty, unreliable, or outdated-to the prediction."[368]

When this theory is combined with the fact that people usually consider a person charged with several crimes to be more of a "criminal type,"[369] it is quite obvious that introduction of prior crimes would more likely cause jurors to determine the guilt of the defendant based on his or her record, instead of the facts of the case. Especially when the prior crimes are similar to the charged crime, a jury is more likely to identify character based on similarity and feel more confident to convict a defendant.

The same study also lends support to two notions. First, a limiting jury instruction is likely to be ineffective. Second, judges, like the jury, may have similar bias in deciding the guilt of a defendant after learning of the defendant's prior convictions. This is because "[e]ven when decision makers are knowledgeable about the factors limiting the accuracy of predictions, their intuitions press them compellingly toward error."[370]

E. General Perception Theories

In general context (not jury decision making), psychological studies support the proposition that people tend to judge a person according to stereotype, character, personal traits, disposition, and others attributes instead of the facts surrounding certain events. All the bases for the judgment are strongly influenced by similar behaviors. The notion that jurors evaluate a defendant based on his character, which

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365. *Id.* at 132.
366. *Id.* at 140.
367. *Id.* at 132-33.
368. *Id.* at 135.
369. Sarah Tanford & Steven Penrod, *Biases in Trials Involving Defendants Charged with Multiple Offenses*, 12 J. Applied Soc. Psychol. 453 (1982).
370. Saks & Kidd, *supra* note 364, at 153.

is strongly affected by similar prior convictions, is therefore consistent with psychological perception theories in general.

"When favorable traits are included in one person's conception of another, other traits in that conception are also likely to be favorable—and the same is true of the perceived co-occurrence of unfavorable traits."[371] Obviously, when a prior crime is introduced to impeach a defendant, the defendant is likely to be perceived as "unfavorable."

Researchers found that, when "one of two interacting persons was made more salient by being in motion or more brightly[,] . . . . [o]bservers attributed that person's behavior more to disposition than the other person's behavior."[372] The researchers also suggested that dispositional attributions were strong when "the uniqueness of the actor is absolute (e.g. the eye-catching striped shirt)" rather than "relative (e.g. the shirt different from those of the other persons)."[373] A conviction is probably quite "eye-catching" to a juror. It is therefore fairly reasonable to infer that a juror would strongly attribute the defendant's behavior to disposition associated with prior crimes rather than the facts of the case.

In one study, researchers suggested that

> there is a pervasive tendency for actors to attribute their actions to situational requirements, whereas observers tend to attribute the same actions to stable personal dispositions. . . . The dispositional category has remained loosely specified, including ability, traits, and attitudes. . . . The observer may know nothing more about the actor than his behavior in a particular situation or in a limited range of situations, whereas the actor knows of his behavior in many situations and is aware of its cross-situational variability. Thus, the observer may assume more consistency of behavior and infer dispositional causality.[374]

Considering that a juror usually does not personally know the defendant, the juror is very likely to judge the defendant based on consistent behavior, namely, similar prior crimes. The effect is probably even more pronounced to a jury because once introduced, a similar prior crime is likely to be a predominant part of what the jury knows about the defendant.

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371. Seymour Rosenberg & Karen Olshan, *Evaluative and Descriptive Aspects in Personality Perception*, 16 J. PERSONALITY & SOC. PSYCHOL. 619, 619 (1970).

372. Harold H. Kelly & John L. Michela, *Attribution Theory and Research*, 31 ANN. REV. PSYCHOL. 457, 466 (1980).

373. *Id.* at 467.

374. *Id.* at 477.

Thus, in sum, a federal appellate court usually affirms a district court's ruling admitting prior similar crime evidence for the purpose of impeaching testifying defendants. Such evidence strongly and sometimes wrongfully and unfairly affects the jury's decision making. Legal empirical studies and social science research tend to prove that introduction of prior acts, especially crimes, unfairly harms defendants. If prior conviction impeachment of the criminal defendant by similar crimes is generally disfavored when offered only to impeach credibility, it follows a fortiori, that the substantive offering of such prior crimes, pursuant to Rule 404(b) against a defendant who may or may not testify is even more prejudicial. Given the marginal (if any) logical relevance of similar acts evidence offered on the issue of intent and the generally acknowledged significant prejudice which inheres in its admission, district courts require guidance on how to consistently balance the probative value of other acts evidence offered on intent against the danger of unfair prejudice and jury confusion prescribed in Rule 403. A number of cases including *United States v. Beechum*,[375] the United States Supreme Court's reasoning in *Old Chief v. United States*,[376] and the rule approved by the Court in the line of cases beginning with *Sandstrom v. Montana*[377] provide a roadmap for the handling of other acts evidence offered on intent, which is balanced and fair to both the government and the criminal defendant.

VI. CONCLUSION

Federal Rule of Evidence 404(b)'s admission of non-similar prior acts of the defendant to show motive, knowledge, common plan, and identity, although always bearing some negative character inference, can and should appropriately be admitted where the acts legitimately prove or help to prove a contested element of the government's case. Though such offers of evidence do not reflect well on the defendant, they do not implicate a chain of reasoning that requires the jury to find propensity in order to find relevance.

Social science and common sense have proven, however, that the admission of similar acts evidence to prove intent in criminal cases is erroneous as a matter of logical relevance. Moreover, given the inescapable propensity inference such offers require and the overwhelming prejudice inherent in the admission of such prior acts, similar acts evidence offered on intent should routinely be excluded under the traditional Rule 401-403 balancing test. This is true particularly in light of social science's (and human intuition's) conclusion that any

375. 582 F.2d 898 (5th Cir. 1978).
376. 519 U.S. 172 (1997).
377. 442 U.S. 510 (1979).

limiting instruction the human mind can fashion will not diminish or cure the prejudice accompanying the admission.

Because social science is essentially united in rejecting even the logical relevance of similar acts evidence on intent, Rule 404(b) should be amended to exclude intent from its list of permissible offers. Assuming this seemingly radical proposal is unacceptable to those who draft and approve amendments to the Rules, it would seem prudent for courts to limit the use of similar acts offered to prove intent to situations where the government is required to independently prove intent, the element of intent is contested, and there is an absence of alternative and less prejudicial evidence of intent.

Thus, where the defendant unequivocally stipulates to the issue of either general or specific intent and the use of the prior acts adds nothing to the legitimate persuasive narrative of the government's case, courts should uniformly exclude the similar acts evidence. Any other ruling would admit the evidence only for the logical purpose of creating prejudice. Further, in the absence of a defense stipulation, where the government has ready access to equally or more probative, and less prejudicial, evidence to prove intent, courts should exclude the similar acts evidence. Finally, where the defendant merely pleads not guilty to a general or specific intent crime, the intent is obvious from the act, and the defendant offers no evidence to specifically contest the issue of intent, courts should exclude similar acts evidence pursuant to Rule 403. It is time to call a spade a spade. Intent shown by similar acts is propensity, and admission of such acts under the rubric of "proving intent" is generally little more than a way to effectively and artificially lower the government's burden of proof and coerce guilty pleas.

Assuming the court determines, despite the findings of social science, that the government's proffer of "naked" similar acts has some logical relevance, the evidence should be excluded where: (1) the intent element of the charged general or specific intent offense is unequivocally stipulated to by the defendant (there is no rational basis to let the government inject the significant prejudice of other crimes evidence into the trial solely to prove a conclusively proven fact because other crimes evidence on intent adds nothing to the government's narrative); (2) in the absence of a defense stipulation, the government has access to other evidence of intent which is equally or more probative (indeed, according to social science, likely more probative) than the other crimes evidence; or (3) where the charged offense is a general intent crime and the defendant does not offer any evidence on lack of intent.

Thus, assuming once again at least marginal relevance of similar acts evidence, a court should only admit such evidence where the defendant has placed his lack of intent in issue and the government has no other significant probative evidence of intent.