A TALE OF TWO WIVES: 404(B) EVIDENCE SIMPLIFIED

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Federal Rule of Evidence 404(b) is a constant source of confusion, contempt, and convoluted reasoning. Rule 404(b) prohibits evidence of an individual's prior bad acts when used to prove conformity with a character trait. No Federal Rule of Evidence generates more appellate pages. This Comment argues that there are foundational issues with a rule that generates so much dispute. That proposition becomes even more evident through examination of the murder conviction of Harold Henthorn. The government's case against Mr. Henthorn relied heavily on the introduction of evidence surrounding his first wife's death. That evidence of prior uncharged conduct—404(b) evidence—became the focus of Mr. Henthorn's appeal. This Comment argues for a reworked Federal Rule of Evidence 404(b) that focuses on clarity and the realities of the jury trial system. The Henthorn *case provides an instructive example of how 404(b) creates confusion and provides an example of how a new rule might operate. It no longer makes sense to allow 404(b) to remain unchanged, and this Comment presents a new rule that considers all sides of the debate surrounding prior bad act evidence.*

* Josiah Beamish, J.D. Candidate, May 2018. I want to thank all of my terrific editors for encouraging me and supplying me with invaluable input. Specifically I would like to thank Simon Vickery, Greg Carter, and Lydia Lulkin. This article is dedicated to my brother Eric Beamish, without whom I would be nothing. Rest in power brother.

INTRODUCTION

Reports of death on the news commonly recite that no foul play is suspected.[1] When someone dies in an apparent accident, it is reasonable to inquire if the death was actually an accident, or if foul play *was* involved. When Harold Henthorn's first wife died in an apparent accident, no charges were filed; no foul play was suspected.[2] Mr. Henthorn, however, could not avoid charges when his *second* wife died.[3] Harold Henthorn was convicted of first-degree murder in the death of Toni Henthorn after a nine-day jury trial.[4] There was minimal evidence to support the charge of first-degree murder when viewed in isolation.[5] The government used two of the nine trial days to present evidence regarding the death of Mr. Henthorn's *first* wife.[6] The government also presented evidence regarding a

1. *See, e.g.*, David Shortell, *Official: No Foul Play in Death of Russian Ambassador to UN*, CNN (Mar. 10, 2017), http://www.cnn.com/2017/03/10/world/russian-ambassador-heart-attack/ [https://perma.cc/86SP-G9NE].

2. Michael E. Miller, *'Lethal Love': Harold Henthorn had Two Wives. Both Died in Bizarre, Brutal Ways*, WASH. POST, (Sept. 22, 2015), https://www.washingtonpost.com/news/morning-mix/wp/2015/09/22/lethal-love-harold-henthorn-had-two-wives-both-died-in-bizarre-brutal-ways/?utm_term=.b28b05861cbb [https://perma.cc/MC2P-YH88].

3. Answer Brief of the United States at viii, United States v. Henthorn, No. 14-CR-00448-RBJ (10th Cir. Oct. 21, 2016) [hereinafter Answer].

4. *Id.*

5. *See* Appellant's Opening Brief at 3, United States v. Henthorn, No. 14-CR-00448-RBJ (10th Cir. July 18, 2016) [hereinafter Opening] (referencing the government's case as "circumstantial" due to the lack of physical evidence).

6. *Id.* at 8. Lynn Henthorn, Mr. Henthorn's first wife, died when their jeep fell on her while they were changing a tire. *Id.* at 9. Law enforcement ruled the death an accident, and Mr. Henthorn was never charged with a crime. *Id.* at 10.

prior incident where Toni Henthorn was seriously injured.[7] The district court allowed the jury to hear the evidence as proof that the incidents were intentional acts by Mr. Henthorn, and not accidents.

The purpose of prior bad act evidence is to use past incidents to illuminate murky areas in a current case.[8] While discussing prior bad act evidence, a Seventh Circuit judge mused: "The man who wins the lottery once is envied; the one who wins it twice is investigated."[9] The judge was specifically referencing Dean John Henry Wigmore's "doctrine of chances."[10] The doctrine of chances is the theory that the improbability of a string of events can act as objective proof that at least one of the events was a criminal act, not mere coincidence.[11] Descriptions of the doctrine of chances can be esoteric, but the doctrine is important to understand. An example will help illustrate both its appeal and its mechanics.

In *United States v. York*, a man sought to collect insurance money in two separate instances: first, when his wife was murdered, and second, when his business partner was murdered.[12] In *York*, the doctrine of chances highlighted the sheer improbability that: (1) a man's wife will get murdered, (2) then his business partner will get murdered, and (3) that he will be the insurance beneficiary both times.[13]

7. *Id.* at 6. In May 2011, Toni Henthorn was seriously injured when she was struck in the back of the neck by a piece of plywood that Mr. Henthorn was tossing off the deck as he worked. *Id.* at 12. Foul play was not suspected in this incident. *Id.*

8. *See* Robert L. Gottsfield, *We Just Don't Get It: Improper Admission of Other Acts Under Evidence Rule 404(b) as Needless Cause of Reversal in Civil and Criminal Cases*, 33 ARIZ. ATT'Y 24, 24 (1997).

9. United States v. York, 933 F.2d 1343, 1350 (7th Cir. 1991). In *York*, the court admitted evidence that the defendant had collected life insurance after his first wife was murdered in order to help prove he killed his business partner in a similar scheme to collect insurance money. *Id.* at 1349–51. The evidence was used to show intent to defraud the insurance company. *Id*. at 1351.

10. *Id.* at 1350 ("[T]he recurrence of a similar result . . . tends to establish . . . the presence of the normal, i.e. criminal, intent accompanying such an act.") (citation omitted).

11. *See* Edward J. Imwinkelried, *An Evidentiary Paradox: Defending the Character Evidence Prohibition by Upholding a Non-Character Theory of Logical Relevance, the Doctrine of Chances*, 40 U. RICH. L. REV. 419, 435 (2006) (discussing one of the earliest invocations of the "doctrine of chances," where it was used to rebut the defendant's claim that his wife drowned in the bathtub accidentally by introducing evidence that prior wives drowned in the bathtub).

12. *York*, 933 F.2d at 1349.

13. *See id.* at 1350 ("That the same individual should later collect on exactly

That improbability also created the inference of criminal intent or planning. The doctrine of chances operates as an intuitive tool to place prior bad act evidence within the larger scheme of more concrete admissible evidence. The doctrine of chances was the issue of the appeal following Mr. Henthorn's conviction, which the Tenth Circuit recently upheld.[14]

The use of prior bad act evidence is governed by Federal Rule of Evidence 404(b).[15] Rule 404(b) prohibits the use of prior bad act evidence to show conformity with a character trait, but that is essentially its lone prohibition. It permits the introduction of evidence for certain other purposes, such as proof of intent, opportunity, or motive. The list of permitted uses for prior bad act evidence is not exhaustive and "the rule is one of inclusion, rather than exclusion."[16] Accordingly, 404(b) evidence is frequently introduced for a variety of purposes, as it was in *Henthorn*.[17] When the evidence is offered for multiple

the same sort of policy after the grisly death of a business partner who owed him money raises eyebrows; the odds of the same individual reaping the benefits, within the space of three years, of two grisly murders of people he had reason to be hostile toward seem incredibly low, certainly low enough to support an inference that the windfalls were the product of design rather than the vagaries of chance.").

14. United States v. Henthorn, 864 F.3d 1241 (10th Cir. 2017).

15. Federal Rule of Evidence 404(b) states:

> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
>
> (2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:
>
> (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
>
> (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

Fed. R. Evid. 404(b). One of the issues with 404(b) is that evidence from prior acquittals may be admitted as "other act" evidence in subsequent unrelated cases. *See* Cynthia L. Randall, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. PA. L. REV. 283 (1992).

16. United States v. Sarracino, 131 F.3d 943, 949 (10th Cir. 1997) (finding harmless error in the district court's failure to analyze certain evidence under Fed. R. Evid. 404(b), where the evidence was used for context) (internal citation and quotation omitted).

17. Opening, *supra* note 5, at 13. The evidence was offered to show lack of accident, intent, and planning. *Id. But see* United States v. Edwards, 540 F.3d 1156, 1163 (10th Cir. 2008) (finding it problematic that the government presented the evidence "to prove the defendant's intent in the current case, to prove his

purposes, it can be hard for the jury to make meaningful distinctions between those purposes, and the evidence can functionally devolve into evidence of bad character.[18] The result is confusion; it is difficult to determine whether the jury convicted the defendant for the charged crime, for previous bad acts, or for some combination.[19] Thus, the central question in the *Henthorn* appeal became—as it arguably becomes in many prior bad acts cases—did the jury convict the defendant for the charged crime or something else? Did the jury convict Mr. Henthorn for the death of his first wife, the death of his second wife, or both?[20] Rule 404(b) is the most cited and litigated Federal Rule of Evidence for just this reason.[21] While there are evidentiary safeguards designed to alleviate issues, 404(b) in its current form is flawed and in need of change.[22]

knowledge, to prove his motive in this case, to prove that there was no mistake or accident, and to corroborate the testimony of several other witnesses") (internal quotation omitted).

18. When referencing the prohibition against the use of character evidence, Justice Jackson notably opined: "The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge." Michelson v. United States, 335 U.S. 469, 475–76 (1948).

19. *See* Opening, *supra* note 5, at 15 ("[T]he evidence concerning Lynn Henthorn's death made up a substantial portion of the government's case and quickly devolved into a mini-trial on her death, putting the defense in the difficult position of essentially having to try both murder cases at once."). The primary purpose of the exclusion of character evidence is that we want the accused to be tried for "what he did, not for who he is." *See* Edward G. Mascolo, *Uncharged – Misconduct Evidence and the Issue of Intent: Limiting the Need for Admissibility*, 67 CONN. B.J. 281, 284–85 (1993) ("Moreover, while the government may be reluctant to admit it, the reasons proffered to admit extrinsic-acts evidence may often be a subterfuge for the real motive . . . an urge to impugn the defendant's character."). This rule was adopted from England and incorporated into the greater Anglo-American common law system to ensure that the defendant is actually convicted of the current charged crime. *Id*. at 284. However, the use of prior bad act evidence is becoming more expansive and threatens to transform the American courts into an inquisitorial system where a defendant is forced to prove his or her innocence, as opposed to the adversarial system where the government must prove guilt. *Id*. A commitment to the adversarial system requires proper use of prior bad act evidence.

20. Opening, *supra* note 5, at 15.

21. *See* United States v. Davis, 726 F.3d 434, 441 (3d Cir. 2013) ("Uncontroversial at the time of adoption, Rule 404(b) has become the most cited evidentiary rule on appeal.").

22. Fed. R. Evid. 104 (the court must determine ahead of time if the evidence is admissible before the jury ever hears it, conducting a hearing if necessary); Fed. R. Evid. 105 (the court must provide a limiting instruction to the jury about the scope of the evidence); Fed. R. Evid. 401 (evidence must be relevant); Fed. R. Evid.

This Comment argues that the current iteration of 404(b) is broken; it presents a different version of 404(b) that would provide clarity for judges and juries, while still favoring admissibility and effective use of prior bad act evidence.[23] Part I discusses *Henthorn* in detail, with specific focus on the use of 404(b) evidence and how the evidence was presented to the district court.[24] Part II examines the internal tension within 404(b) and addresses the central arguments on both sides of the debate surrounding its usage.[25] While the two sides can seem irreconcilable, this Comment attempts to find middle ground that incorporates critical features of both arguments. Part III demonstrates that all 404(b) evidence is propensity evidence and offers a proposed change to 404(b) that addresses this reality.[26] The proposed change rejects semantic labels such as "propensity" and "character" and instead takes a realistic and pragmatic approach to prior bad act evidence. The purpose of a more pragmatic approach is to aid both judges and juries who have to make difficult and strained decisions concerning 404(b) evidence. Part IV applies this proposed rule to *Henthorn*, a fascinating modern case laden with unique facts and the common confusion that surrounds 404(b).[27] This Comment concludes that an examination of *Henthorn* and all the controversy surrounding 404(b) shows that the rule needs to be redrafted with a focus on the realities and history of 404(b).[28]

I. THE *HENTHORN* CASE

On the afternoon of September 29, 2012, Harold Henthorn took his wife on a surprise hike for their twelfth wedding anniversary.[29] The hike ended when his wife fell 128 feet off of

403 (evidence must be probative and not unduly prejudicial); Fed. R. Evid. 404(b) (notice of intent to use prior bad act evidence must be given in advance). *But see* Paul F. Rothstein, *Intellectual Coherence in an Evidence Code*, 28 LOY. L.A. L. REV. 1259, 1260 (1995) ("The first and second sentences [of 404(b)] cannot be construed consistently in light of their interpretation of case law.").

23. *See* Huddleston v. United States, 485 U.S. 681, 688 (1988) (noting that the legislative history of 404(b) shows that the law was meant to favor admissibility).

24. *See infra* Part I.

25. *See infra* Part II.

26. *See infra* Part III.

27. *See infra* Part IV.

28. *See infra* Conclusion.

29. Alan Gathright, *Murder Trial Evidence Documents Harold Henthorn's*

a cliff.[30] She did not survive the fall, and Mr. Henthorn was charged with murder.[31] There were no eyewitnesses, and scant evidence was available to the government, outside of a map with an X drawn where Toni fell.[32] Due in part to the lack of hard evidence, the government introduced evidence surrounding the death of Mr. Henthorn's first wife, Lynn, to prove its case.[33]

A. 404(b) Evidence in Henthorn

The use of 404(b) evidence was essential for the government to secure a conviction.[34] Because there was a lack of physical evidence and eyewitness testimony in the Henthorn murder trial, the judge's decision to include 404(b) evidence was critical to the outcome of the trial.[35] As required by 404(b), the government provided notice of intent to introduce prior bad act evidence.[36] The government noted that this evidence would be "critical" and intended to introduce it to show Mr. Henthorn's "intent, motive, and plan."[37] Later in the notice, however, the government stated that they intended to introduce evidence surrounding the death of Mr. Henthorn's first wife to show "intent, motive, preparation, plan, and lack of accident."[38] The only enumerated 404(b) purposes that the

Elaborate Plot to Push Wife off Cliff at RMNP, DENVER CHANNEL, http://www.thedenverchannel.com/news/front-range/denver/murder-trial-evidence-documents-harold-henthorns-elaborate-plot-to-shove-wife-from-cliff-at-rmnp (last updated Oct. 3, 2015, 12:56 AM) [https://perma.cc/4XXN-GPPN].

30. *Id.*

31. *Id.*

32. *Id.*

33. Government's Notice of Rule 404(b) Evidence at 1, United States v. Henthorn, No. 14-CR-00448-RBJ (D. Colo. Jan. 29, 2015) [hereinafter Notice].

34. *Id.*

35. *See id.* at 5 ("[T]he proof that he murdered her must rely on the circumstances leading up to her death as well as prior actions that suggested he planned to kill her."). The Government conceded that the 404(b) evidence was potentially determinative for the case. Therefore, the entire case may have rested on the trial court judge's decision regarding said evidence. Logically, this makes sense. Defendants are presumed innocent. When a jury is presented with scant evidence of guilt, this presumption will likely hold. However, when the jury is presented with evidence that erodes that presumption, the jury will be more inclined to rely on that same scant evidence. Because of what they heard about the defendant's prior bad acts, now they *want* to believe the government.

36. *Id.* at 1.

37. *Id.*

38. *Id.* at 4.

government did not include were identity, knowledge, and opportunity.[39] The government offered every purpose that could reasonably be presented.

The jury was asked to sort through that variety of 404(b) purposes concerning the same information and make a key determination. As noted above, the 404(b) evidence was critical. The government admitted that the scarcity of hard evidence made the 404(b) evidence more admissible.[40] Unsurprisingly, while the government referenced the highly probative value of the evidence, it did not mention its similar, arguably greater, prejudicial effect.[41] In order to demonstrate the probative value of the evidence, the government listed the similarities in the deaths of Mr. Henthorn's wives and invoked the doctrine of chances.[42]

Mr. Henthorn moved to have this evidence precluded from admission.[43] The motion goes into great detail about the accidental nature of Lynn Henthorn's death.[44] Mr. Henthorn argued against the inclusion of the evidence because the evidence would result in a "trial within a trial" and invite impermissible character inferences.[45] The core of Mr. Henthorn's argument was that the government must precisely articulate how the evidence will be used and for what purpose,

39. Fed. R. Evid. 404(b). Presumably, the government made that choice because none of those matters were in dispute. The identity of the only possible suspect was known. The government was not trying to prove that Mr. Henthorn had specific knowledge. Mr. Henthorn's opportunity to commit the crime was also not in dispute.

40. *See* Notice, *supra* note 33, at 13 (citing Old Chief v. United States, 519 U.S. 172, 184–85 (1997) for the proposition that "scarcity of evidence on point increases its probative value in Rule 403 balancing"). Federal Rule of Evidence 403 is critical to the introduction of all evidence and requires that the probative value of evidence outweigh its prejudicial effect.

41. *Id.*

42. *Id.* at 10–11. The similarities between the deaths were listed as: bizarre "accidents," insurance benefits, remote locations, Mr. Henthorn as the lone witness, deaths after about 12 years of marriage, inconsistent stories from Mr. Henthorn about the deaths, both wives were doing atypical things when they died, Mr. Henthorn was eager to have both bodies cremated, and he spread both wives' ashes in the same mountains. *Id.*

43. Defendant Henthorn's Motion *in Limine* Regarding Proposed Douglas County 404(b) Evidence, United States v. Henthorn, No. 14-CR-00448-RBJ (D. Colo. Mar. 16, 2015) [hereinafter MIL].

44. *See generally id.*

45. *Id.* at 11 ("If the prosecution is successful in speculating about the past by slandering his character, it follows that the prosecution will never have to prove its case.").

without any inference of character or criminal proclivities.[46] Both Mr. Henthorn and the government made mention of the oft-cited "four-prong" test that has become commonplace in 404(b) analysis, which mirrors the evidentiary safeguards mentioned above.[47] As will be discussed in Part II, evidentiary problems stem mainly from 404(b) confusion and overreliance on jury instructions as a remedy if the jury gets confused or misled.

In its notice, the government stated its full list of proffered 404(b) purposes and then briefly described how the evidence shows plan, preparation, or lack of accident.[48] The government then explained how the doctrine of chances is itself the articulation of a precise purpose that is required by 404(b).[49] This notion further complicates the role of 404(b) because it forces jurors to: (1) sort through and compartmentalize the 404(b) evidence; (2) figure out how it fits with any of five offered purposes; (3) reconcile all of the 404(b) evidence with a theory based on objective mathematical probabilities; and (4) somehow keep out any thought of criminal propensity. While jury instructions are intended to alleviate these concerns, they are rarely effective.[50]

The government proposed jury instructions that listed

46. *Id.* at 12.

47. *Id.* at 14; Notice, *supra* note 33, at 6. The test is: (1) the evidence must be offered for a proper purpose under Rule 404(b); (2) the evidence must be relevant; (3) the court must determine that, under Rule 403, the probative value of the evidence is not "substantially outweighed by its potential for unfair prejudice;" and (4) if requested under Rule 105, the court must instruct the jury that the evidence is to be considered only for the purpose for which it was admitted. United States v. Joe, 8 F.3d 1488, 1495 (10th Cir. 1993).

48. Government's Response to Henthorn's Motions in Limine to Exclude 404(b) Evidence at 5–6, United States v. Henthorn, No. 14-CR-00448-RBJ (D. Colo. Apr. 6, 2015) [hereinafter Response].

49. *Id.* at 7 ("[T]he government did so in its 404(b) notice when it explained that Lynn's death is relevant under a doctrine of chances theory.").

50. *See* Robert C. Power, *Reasonable and Other Doubts: The Problem of Jury Instructions*, 67 TENN. L. REV. 45, 98 (1999) (discussing how studies have shown that many jurors "fail to comprehend key instructions"); *see also* Antonia M. Kopeć, *They Did It Before, They Must Have Done It Again; The Seventh Circuit's Propensity to Use a New Analysis of 404(b) Evidence*, 65 DEPAUL L. REV. 1055, 1087 (2016) (citing studies that show juries' cognitive functions are not affected by limiting jury instructions, but are affected by evidence of prior bad acts). Kopeć uses a colorful illustration to demonstrate this point: "If a person is told not to imagine a purple elephant in the middle of the room, she immediately imagines just that." *Id.*

every proper use of 404(b) referenced in the rule.[51] This instruction, however, was merely the pattern jury instruction for 404(b) in the Tenth Circuit.[52] The defense countered with an instruction that limited the evidence to that which directly rebutted Mr. Henthorn's story—evidence showing lack of accident, planning, and intent.[53] More importantly, the instruction stated that "[i]f you decide that Mr. Henthorn did not commit the Douglas County act, then you are not to consider the evidence about the act for any purpose."[54]

B. District Court Decision

The district court allowed in the 404(b) evidence, stating that a reasonable jury could conclude by a preponderance of the evidence that Mr. Henthorn "orchestrated the murder of Lynn Henthorn."[55] The court relied heavily on the inconsistencies in Mr. Henthorn's account of events.[56] The court, like the government, downplayed the existence of any unfair prejudice.[57] But the court did limit the proffered evidence to show plan, intent, and absence of accident, as opposed to the

51. Objection to Defendant's Proposed Jury Instruction Regarding Similar Acts Evidence at 7, United States v. Henthorn, No. 14-CR-00448-RBJ (D. Colo. Aug. 26, 2015) [hereinafter Jury Instructions]. The instruction read:

> You have heard evidence of other acts engaged in by the defendant. You may consider that evidence only as it bears on the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident and for no other purpose. Of course, the fact that the defendant may have previously committed an act similar to the one charged in this case does not mean that the defendant necessarily committed the act charged in this case.

Id.

52. *Id.*

53. *Id.* at 8.

54. *Id.* The "Douglas County act" referenced was the death of Lynn Henthorn, Mr. Henthorn's first wife. The introduction of prior bad acts is often referred to as a "trial within a trial," where the court holds a hearing to determine whether or not the jury should hear the 404(b) evidence. *See* Louis F. Meizlish, *Evidence*, 59 WAYNE L. REV. 1033, 1089 (2014).

55. Order at 5, United States v. Henthorn, No. 14-CR-000448 (D. Colo. Nov. 5, 2014) (order denying motion in limine in part) [hereinafter Order].

56. *Id.* ("The government exposed a number of discrepancies in Mr. Henthorn's various accounts of the events leading to the death of Lynn Henthorn.").

57. *Id.* at 11 ("Although this evidence might provoke an emotional response, it would not do so 'wholly apart' from its relevance to rebutting the defense of accident or to showing plan and intent. The prejudice resulting from the admission of this evidence is therefore not 'unfair.'").

more expansive list offered by the government.[58]

The district court's order contained an inaccuracy: it accepted the government's contention that the Supreme Court had adopted the doctrine of chances as a permissible evidentiary tool.[59] The government relied on the case *Lisenba v. California* for this proposition; but a close reading of *Lisenba* reveals that the cite by the district court is misleading.[60] This error grafted a Supreme Court gloss on the use of 404(b) evidence; it is impossible to know how much the court relied on that misstated precedent in its ruling. The district court's ruling further muddles an already confusing doctrine and could have a damaging precedential effect, not unlike *Lisenba* itself. This confusion highlights the complicated and inconsistent treatment of 404(b) that necessitates a reworked rule.

The case of *United States v. Henthorn*[61] demonstrates the recurring issues with prior bad act evidence: (1) 404(b) evidence offered for a multitude of purposes that the jury must untangle; (2) allowing the lack of concrete evidence to increase the probative value of prior uncharged acts; (3) general confusion about precedent and the lack of cognizable standards; (4) the inevitability of character inferences; and (5) the ineffectiveness of jury instructions. Through that lens, this Comment argues in favor of an amended rule that would reduce confusion for both judges and juries, cut down on unfair prejudice, and still preserve the use of 404(b) evidence in cases where it is probative, relevant, and assists the government in prosecutions.[62]

Before offering an amended rule—in hopes of finding a

58. *Id.* at 4. As a refresher, the list originally offered by the government was "intent, motive, preparation, plan, and lack of accident." Notice, *supra* note 33, at 4.

59. Order, *supra* note 55, at 8 ("[T]he Supreme Court has in fact adopted the 'widely recognized principle that similar but disconnected acts may be shown to establish intent, design, and system.' *Lisenba v. California*, 314 U.S. 219, 227 (1941).").

60. The full quote is: "Testimony *was* admitted concerning the death of James' former wife, on the widely recognized . . . ." Lisenba v. California, 314 U.S. at 227. The Court further stated that "[w]e do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence." *Id.* at 229. The Court was not adopting the "doctrine of chances," rather, the Court was referencing that the state of California had adopted it, and that was well within its purview.

61. United States v. Henthorn, 864 F.3d 1241 (10th Cir. 2017).

62. *See infra* Part IV.

sensible, effective middle ground—it is important to examine and understand the arguments on both sides of 404(b) in its current form.

II. INHERENT CONFLICT IN FEDERAL RULE OF EVIDENCE 404(B)

Criticisms of 404(b) and proposals for an amended version abound.[63] But these criticisms and proposals continue to come up short by either presenting criticism with only a general proposal for change, or by proposing looser restrictions on 404(b) with the expectation that a jury instruction will cure all ails.[64] When viewing these particular criticisms through *Henthorn*, it is clear that more judicial discretion will not solve the issues, nor will any version of a jury instruction.[65] There should be more focus placed on Rule 403 balancing—weighing the probative and prejudicial effects of evidence—with more than a passing reference to the prejudicial effects.

The problem with 404(b) decision making centers around

63. *See* Paul F. Rothstein, *Needed: A Rewrite. Where the Federal Rules of Evidence Should Be Clarified*, 4 CRIM. JUST. 20, 23 (1989) ("The new rule should produce results more in accord with the intention of the present rule and the common law: If a broad-based attack on the type of person is the aim, the evidence should be excluded; but if some pattern truly more probative or less morally charged than that is involved, the evidence should be viewed more favorably."); *see also* Thomas J. Leach, *"Propensity" Evidence and FRE 404: A Proposed Amended Rule with an Accompanying "Plain English" Jury Instruction*, 68 TENN. L. REV. 825, 827 (2001) ("[J]udges and practitioners alike cannot understand it well enough to apply it soundly—not because they are unintelligent, but because the rule is hopelessly opaque . . . the Rule causes all involved in the trial process . . . to leave the trial with queasy feelings that justice has been slighted or short-changed.").

64. *See* Rothstein, *supra* note 63, at 23 ("When the evidence is to be used against a criminal defendant, the probative value must *substantially* outweigh.") (emphasis in original); Leach, *supra* note 63, at 827 ("I urge that a looser form of the Rule should invest more discretion with the trial bench, with the added safeguard of a jury instruction that gives sufficient guidance to prevent misuse of the evidence.").

65. *See* Power, *supra* note 50, at 98–99 ("Too often instructions are stated in abstract legal terms that further aggravate jury confusion."). Jurors are frequently presented with pattern jury instructions that are rendered in the abstract and riddled with "jargon and legalese." *Id.* at 98. An important consideration, especially in the character evidence context, is that "jurors are not selected for their intelligence or their impartiality." *Id.* at 103. Perhaps more importantly, jury instructions are given after all evidence and closing arguments, at a point where jurors have likely made up their minds as to what they believe happened, what "story" they believe. *Id.* at 104.

the definition of what "propensity" evidence is, whether or not "propensity" evidence is fair and viable, and if there truly is a difference between "specific propensity" and "general propensity."[66] One school of thought, developed by Paul F. Rothstein, contends that all 404(b) evidence is propensity evidence and will always lead to impermissible character inferences.[67] The opposing view, held by Edward J. Imwinkelried, is focused on objectivity and abstraction, using the doctrine of chances to attempt to remove any impermissible character inferences.[68] This Part argues that there is no true difference between the two; all 404(b) evidence is propensity evidence.

A. 404(b) Evidence Is Propensity Evidence

Rothstein posits that *any* evidence offered under 404(b) is propensity evidence, either "general propensity" (propensity to be violent, commit a crime, etc.) or "specific propensity" ("the propensity to do a certain thing in a certain way repeatedly").[69] Specific propensity to do something can take the form of plan, intent, motive, etc.[70] As Rothstein points out, the first sentence in 404(b) appears to ban general propensity evidence, while the second sentence appears to permit specific propensity evidence.[71] This is the internal incoherence in 404(b) that

66. *See, e.g.*, Kenneth J. Melilli, *The Character Evidence Rule Revisited*, 1998 B.Y.U. L. REV. 1547, 1560–61 (1998) (arguing that the distinction between specific propensity and general propensity or the distinction between character and non-character evidence is an illusion, stating that "the distinction present in both Rule 404(b) and its predecessor common law rules between inadmissible 'propensity' evidence and admissible 'noncharacter' evidence only makes sense if that distinction is real. There must be an articulable, comprehensible boundary between the two.").

67. *See generally* Rothstein, *supra* note 22. Rothstein is a professor of law at Georgetown University and was a consultant on the Federal Rules of Evidence. He has published several books and over one hundred articles.

68. *See generally* Imwinkelried, *supra* note 11. Imwinkelried is the former chairman of the Evidence Section of the American Association of Law Schools and has written extensively on 404(b), including the book *Uncharged Misconduct Evidence*.

69. Rothstein, *supra* note 22, at 1264 (explaining the artificial distinction between specific propensity and general propensity).

70. *Id.*

71. *Id.* at 1260 ("The first sentence commands, in effect, 'Thou shalt not use other crimes, wrongs or acts to prove character in order to prove an act in conformity with that character.' The second sentence, however, says, in effect, 'Yes, but you may use those other crimes, wrongs, or acts in order to prove . . . .'").

draws Rothstein's criticism.[72] How does one separate general from specific propensity? Is there truly a difference, or is it an artificial distinction? There are no easy answers. But if the specific propensity could be singled out and supported—evidence of a plan or of specific knowledge—it would be less likely that a jury would make an impermissible character evaluation.[73] The narrower the focus, the easier the evaluation. It is in that way that specific propensity can be useful without being unduly prejudicial, unlike general propensity, which will always present as conformity with a character trait.

Defenders of the current state of 404(b) demand a focus on the objective aspects of the evidence.[74] As noted above, the distinction between general propensity and specific propensity is arguably artificial.[75] To alleviate this apparent artificial distinction, the argument is that the attention should be on the act—not the actor—with an objective focus.[76] In this way, juries can avoid impermissible character inferences by objectively focusing on the *act* (the receipt of stolen property) and not subjectively towards the *actor* (one who tends to receive stolen property). Then, they can utilize the evidence without impugning the defendant's overall "character." This has also been referred to as a focus on "independent relevance" outside of the character context.[77] The doctrine of chances

While it is generally understood that 404(b) is inclusionary and the list of exceptions non-exhaustive, proponents tend to stay within the enumerated list. *See* Melilli, *supra* note 66, at 1561 ("It seems after centuries of experimentation, the universe of possible 'noncharacter' theories of relevance has become substantially closed, the inclusionary formulation of the rule notwithstanding.").

72. Rothstein, *supra* note 22, at 1260 ("This dichotomy does not hold up under closer examination.").

73. *See id.* at 1264–65 ("These propensities are too specific in that they are addressed to the manner or means of carrying out the offense."). However, these specific propensities may have a "moral tinge." *Id.*

74. *See, e.g.*, Imwinkelried, *supra* note 11, at 431.

75. *See, e.g.*, Melilli, *supra* note 66, at 1554–55. Melilli uses the example of a bank robber who robs banks with a similar methodology. The evidence of prior bank robberies is used to show the defendant has the specific propensity to use certain modus operandi to rob banks. However, when presented with this evidence, "one cannot learn how the defendant robs banks without being informed that the defendant robs banks." *Id.* at 1555. In this way, it is impossible to avoid a determination that the defendant has a criminal propensity.

76. Imwinkelried, *supra* note 11, at 431.

77. Huey L. Golden, *Knowledge, Intent, System, and Motive: A Much Needed Return to the Requirement of Independent Relevance*, 55 LA. L. REV. 179, 181 (1994) (explaining that the second sentence of 404(b) is one that allows in evidence as long as it has independent relevance outside of character).

operates as a useful tool, if used properly, to return the focus to objective specificity. Even if all 404(b) evidence *is* propensity evidence, 404(b) is still a valuable and often indispensable tool. Rule 404(b) should therefore be revised with an infusion of simplicity and coherence.

B. The Doctrine of Chances As a Sword

As seen in *Henthorn*, objectivity is often demonstrated through the doctrine of chances. Essentially the jury is asked one question: What are the chances?[78] In combination with the list of permissible 404(b) purposes, the more specific questions begin to form: What are the chances the defendant did not know something? What are the chances that a particular occurrence wasn't planned? What are the chances that a particular incident was an accident? In this way, the doctrine of chances attempts to shift the focus from character to probabilities.[79] However, as critics of the doctrine of chances have stated, the doctrine still appears to rely on propensity reasoning.[80]

Andrew Morris offered the example of flipping a coin.[81] The chance of flipping a coin and it landing heads is 50%. Before the first flip, the chance of flipping two heads in a row is

78. Rothstein, *supra* note 22, at 1262 (reasoning that the doctrine of chances "asks a question that supposedly reconciles the dilemma" regarding the internal tension in 404(b) between objectivity and subjectivity).

79. *See* Imwinkelried, *supra* note 11, at 437 ("Rather, the proponent offers the evidence to establish the objective improbability of so many accidents befalling the defendant or the defendant becoming innocently enmeshed in suspicious circumstances so frequently. The proponent must establish that, together with the uncharged incident, the charged incident would represent an extraordinary coincidence."). The doctrine of chances fits perfectly with cases like *Henthorn*.

80. *Id.* at 450 ("They must therefore mean that if we eliminate the possibility of random chance, the only remaining logical route to the conclusion of fault requires an inference that the defendant's propensity prompted the defendant to form the wrongful intent."). Specifically, the mathematical basis for the doctrine of chances relies on the difference between the expected value of an event's occurrence and the actual value. *Id.* For example, in *Henthorn*, the expected value of losing one's spouse in a freak accident would be incredibly low, say 0.1%. The expected value of it happening twice would be significantly lower still, 0.1% x 0.1%, or .01%. However, for Mr. Henthorn, the actual value of both ended up being 1 or 100%. Critics of the "doctrine of chances" would point out that the only way to explain that difference is some sort of propensity reasoning, or even a character inference.

81. Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 193 (1998).

50% x 50%, or 25%. More flips in a sequence further decrease the odds that every flip will be heads. At some point, consistently flipping heads ceases to look like coincidence. The coin-flipper begins to look like a cheater; a character inference is born.[82] This example shows both the logic behind the doctrine of chances as an objective probability determination and the way in which a character inference becomes almost inevitable.

Imwinkelried rejects this line of reasoning.[83] He argues that even if a person has a propensity towards lawful or unlawful conduct, in the moment, that propensity can be ignored in favor of free will.[84] Additionally, he attacked Morris's apparent oversimplification of the chance/cheater dichotomy and elucidated a more complex, four-outcome model.[85] The four potential outcomes are: coincidence, a cheater who cheats every time, someone who is not a cheater that still chooses to cheat, and a combination of chance and situational cheating.[86] He argued for the process of elimination of the four outcomes—where an outcome is eliminated and the probabilities of each remaining outcome increase—and theorized that jurors are perfectly capable of performing that exercise.[87] As you will hopefully see, performing the same exercise in *Henthorn* is instructive. And keep in mind, juries are expected to fully understand this analysis and make a just determination.

Option One of the coincidence of two wives dying in bizarre accidents, with no witnesses, can safely be eliminated as too unlikely for purposes of this exercise. It is possible for a spouse to suffer that misfortune twice, but the chances are low. Option Three of merely situational choices can also be eliminated; it defies logic for the purposes of this exercise to say Mr.

82. *See* Imwinkelried, *supra* note 11, at 450.

83. *See id.* at 451 (explaining away the criticism of the doctrine of chances by focusing on human free will).

84. *Id.*

85. *Id.* (explaining that there are actually four outcomes in the coin-flip hypothetical: "(1) random chance was at work; (2) the person flipping has a propensity to cheat . . . causing him to cheat on all five occasions; (3) although the person flipping has no propensity to cheat, on all five occasions the person made a situational choice to cheat; and (4) . . . random chance accounts for some of the flips that resulted in heads, and on the remaining flips the person made a free, situational choice to cheat").

86. *Id.*

87. *Id.* at 452.

Henthorn has no criminal or murderous propensity, but situationally murdered two wives in devious insurance money schemes. In that situation, one could argue he had no criminal propensity when he killed his first wife. Maybe it was impulsive; maybe it was absentminded. It could have been a situational choice that does not show an overall criminal propensity. That reasoning falls apart with the second murder. A second murder demonstrates some degree of criminal propensity.

This leaves Option Two, criminal/murder propensity, and Option Four, random chance mixed with situational choice. Option Two necessarily contemplates that Mr. Henthorn had both the general propensity of criminality and the specific propensity to devise careful schemes to murder his wives, collect insurance money, and not get caught.[88] In that situation, it would be hard to argue the evidence was unfairly introduced or that Mr. Henthorn faced undue prejudice. It cannot be asserted, however, that Option Two is the most probabilistic option. But, because Options One and Three can be reasonably eliminated, the probability of Option Two increases significantly over the base position with four options. There is enough circumstantial evidence in the two deaths to argue that Option Two—criminal propensity—is viable.

Option Four presents the most interesting hypothetical: in this combination, Mr. Henthorn either murdered his first wife and his second wife died accidentally, or his first wife died accidentally and he murdered his second wife. Option Four illuminates the troubling use of 404(b) evidence in *Henthorn*. Mr. Henthorn either got away with murder and was then wrongfully convicted, or evidence of an accidental death was used to secure a conviction for the murder he *did* commit. Even the model proposed by one of the most ardent supporters of the

88. However, it would take more than a preponderance of the evidence standard to introduce the 404(b) evidence in order to definitively say that Henthorn has that level of criminal propensity. The Supreme Court has stated that "[t]he court simply examines the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." Huddleston v. United States, 485 U.S. 681, 690 (1988). This is the precedent that was relied upon by the district court in Henthorn. Order, *supra* note 55, at 5 ("The first question, then, is whether the proffer and evidence submitted by the government are sufficient for a jury to reasonably find the conditional fact—that Mr. Henthorn orchestrated the murder of Lynn Henthorn—by a preponderance of the evidence. The Court finds that they are.").

doctrine of chances has serious flaws when practically applied to a current case.

C. The Doctrine of Chances As a Shield

The doctrine of chances has also been defended on a different theory: it may be the only way to preserve the character evidence prohibition.[89] Dain Smoland gleaned from the relaxed character evidence prohibition that, in some cases, not allowing 404(b) evidence in a particularly brutal or heinous case could lead to the kind of public outrage that would pressure legislators to end the character prohibition altogether.[90] Smoland argues that the doctrine of chances provides the safety valve that upholds the character evidence prohibition and ends up serving defendants better than any attempt to abolish the doctrine of chances.[91] He also makes a critical distinction that is relevant to *Henthorn*: the doctrine of chances makes more sense in situations where there is a clear "statistical anomaly"; there is a real difference between using the doctrine of chances in cases with fairly regular occurrences, like bank robberies, and the famous case of a man whose wives kept dying in the bathtub in "accidental" drownings.[92] *Henthorn* fits neatly into the latter variety of cases. While Smoland conceded that the doctrine of chances does invite "a character propensity judgment," he argues that the issue can

89. Dain Smoland, *Keep Calm and Argue the Facts: A Pragmatic Approach to the Doctrine of Chances*, 26 UTAH B. J. 45, 46 (2013) (referencing the expansion of prior bad act evidence to allow for character evidence in child molestation cases by stating, "[t]he legislature decided that evidence of past child molestation is simply too important and probative to be restricted by the character prohibition. There is no reason the exception couldn't be widened, or the general character evidence prohibition done away with entirely").

90. *Id.* at 46–47.

91. *Id.* at 47 ("With the general character prohibition gone, judges would be left doing Rule 403 balancing for every case with prior bad acts evidence, and doing it *without* the scale automatically tipped away from bad character evidence. It would be very time consuming and probably result in the admission of more such prior bad acts evidence. I would argue that the general character prohibition serves defendants better, even with the shadow of the [doctrine of chances] over it.").

92. *Id.* ("The distinguishing question, then, is whether the facts of each case present an 'improbably rare misfortune'—a statistical anomaly that tends to rule out the possibility of innocent bad luck."). The famous case referenced is Rex v. Smith, 11 Cr. App. R. 22 (1915), which occurred in 1915 in England, referred to by Smoland as the "'original' DOC case." *Id.* at 46–47.

be alleviated with a narrower construction of 404(b) and a heightened focus on 403 balancing, and that the doctrine's preservation may be what saves the character evidence prohibition in its entirety.[93]

As Kenneth Mellili argues, "[t]he doctrine of chances . . . is often simply a different way of articulating how evidence might come within one or more of the specified permissible theories of admissibility contained in the second sentence of Rule 404(b)."[94] That view, combined with the pragmatic approach offered by Smoland, shows that problems with the doctrine of chances can be solved through fixing the problems with 404(b) generally. The doctrine of chances is a valuable, intuitive tool that can help juries focus on objectivity and specificity. But the veracity of the doctrine of chances is dependent on the overall structure and usage of 404(b). A more effective 404(b) will in turn make for a more effective doctrine of chances.

III. PROPOSED NEW VERSION OF FEDERAL RULE OF EVIDENCE 404(B)

As a refresher, 404(b) permits the introduction of prior bad act evidence to show: motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.[95] Redrafting 404(b) necessarily involves analysis and a fuller understanding of what those purposes actually mean in legal terms. In the interest of simplicity and clarity, the list can be shortened. Plan and preparation are duplicative and can be fully encapsulated in plan.[96] A similar method can be applied to intent and absence of mistake. Logically, an absence of mistake or accident involves some level of intent, and intent better captures the issue. Even if the evidence was offered to

93. *Id.* at 48–49 ("[T]he DOC need not be the exception that swallows the rule, but just another fact-specific and somewhat nebulous exception in an area of law already thick with them.").

94. Melilli, *supra* note 66, at 1565.

95. Fed. R. Evid. 404(b).

96. *See, e.g.*, Jacob Scott, *Codified Canons and the Common Law of Interpretation,* 98 GEO. L.J. 341, 365 (2010) ("Ten states have codified the rule against surplusage, and none have rejected it."). The rule against surplusage would require courts to strain to find distinct meaning for plan and preparation that would likely be soaked in legal fiction. This is because the rule against surplusage requires courts to read statutes to give independent meaning to all parts. *Id.* If the goal is a more effective tool for jurors, adding legal gymnastics does not serve that goal.

show that an incident was not a mistake, the absence of a mistake or accident invites intent to fill the void.[97] Analysis of identity also delves into modus operandi and is beyond the scope of this article. Therefore, this Part will focus on plan, intent, and knowledge.

A. Plan

In the 404(b) context, what does "plan" actually mean? Plan is "one of the most popular theories for introducing evidence of an accused's uncharged misconduct" and "courts have tended to liberally admit uncharged misconduct under the rubric of 'plan.'"[98] Imwinkelried posits that there are three versions of plan that are "vying for judicial acceptance": (1) the unlinked plan, where the evidence can be admitted when the charged and uncharged acts share a common methodology; (2) the linked methodology, where the evidence can be admitted if it shows that the methodology itself was planned, without needing to show a "grand design" between the charged and uncharged act; and (3) the linked acts, where it needs to be shown that the charged and uncharged acts were part of an overall plan or scheme.[99]

The unlinked plan option is untenable because it too easily devolves into a character inference.[100] For a court to allow plan evidence of this variety would invite the proponent to cram almost any prior uncharged act into the framework of a "plan." In this way, any prior uncharged bad act with a simple methodology that occurred within reasonable temporal proximity could be used as proof of the accused act with the same simple methodology. Not all crimes are complex, and allowing simple methodology alone as probative evidence is far too generic to be useful.

The linked methodology option requires planning of the

97. As 404(b) analysis centers on how juries use the evidence, it is always important to consider basic sense and logic.

98. Edward J. Imwinkelried, *Using a Contextual Construction to Resolve the Dispute over the Meaning of the Term "Plan" in Federal Rule of Evidence 404(b)*, 43 U. KAN. L. REV. 1005, 1008 (1995).

99. *Id.* at 1009–10.

100. *Id.* at 1012 ("When the prosecutor relies on this minimal showing, the prosecutor is implicitly saying, 'The accused did it once recently; therefore, the accused did it again.'").

methodology itself, not mere coincidence or happenstance.[101] Imwinkelried offers two versions of this option: the template model and the repeated choice model.[102] This option is distinguished from general propensity character evidence because it is focused on "situationally specific propensity" and is too narrow to be viewed as a general character trait.[103] However, Imwinkelried is not convinced that this is a viable option for a logical definition of plan because, "all the prosecutor is showing, in essence, is that the accused committed similar physical acts because the accused made similar methodological choices."[104] But if the common methodology looks more like a pre-formed methodology—a *template*—it provides the vital link between the charged act and the prior bad act that makes the prior act more probative.[105]

The linked acts option is the most restrictive and requires "a single, overall grand design encompassing the charged and uncharged crimes."[106] This option fits best with a common sense idea of the word "plan," and would be the hardest to prove.[107] The linked acts option also provides a logical connection point to the doctrine of chances and shows how it can avoid character inferences. The level of detail and evidence required to show a linked acts plan belies any mental shortcuts and forces a jury to evaluate the full plan presented to them. Linked acts require the level of proof and objective focus that can restore viability to 404(b).

There are also several versions of the linked acts option: the sequential plan, the chain plan, and the bizarre plan.[108]

101. *Id.* at 1013 ("[I]n Dean Wigmore's words, there must be 'such concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.'").

102. *Id.* The template model involves a predetermined template to be employed whenever the opportunity to commit the crime occurs, where the repeated choice model does not involve the same degree of predetermined contemplation, but more of an ad hoc decision to employ prior, successful methods. As Imwinkelried puts it, "[i]t worked before; I'll try the same plan again." *Id.*

103. *Id.* at 1014.

104. *Id.* at 1037.

105. *See id.* (noting that the template model may still be a rare tool for prosecutors because it could be hard to "establish the necessary predicate").

106. *Id.* at 1014–15 ("[A]ll the crimes are integral components of the same plan; each criminal act is a step or stage in the execution of the plan.").

107. *Id.* at 1014.

108. *Id.* at 1015–16.

The sequential plan is offered with a common example of a defendant stealing a key and then using the key to commit an additional theft.[109] Whichever of those crimes the defendant was charged with, evidence of the other crime would be relevant, probative, and contain very little danger of prejudice. In this way, the sequential linked act theory is an acceptable usage of prior bad acts. The chain theory, however, does not require the same sequential structure; the acts all go towards the same overall goal, but in a less discernible pattern.[110] Outside of temporal clarity, this version has essentially the same features as the sequential plan, where any of the bad acts are probative of the others when the grand scheme can be identified. The third version, the bizarre plan, is unlikely to be presented and may suffer from more prejudicial issues than Imwinkelried cares to mention.[111] If the evidence is offered to show plan, the proponent should be required to present enough evidence to show a plan actually exists.

A prior scheme that develops into multiple bad acts, one or more of which the defendant is charged with, is exactly the sort of situation where 404(b) can be a useful tool. Plan is first and foremost in any list of acceptable uses for 404(b) evidence.

B. Intent

Prior bad act evidence used to show the intent of a defendant in a charged act is perhaps the most controversial usage, yet arguably the most useful to prosecutors.[112] The

109. *Id.* at 1015 ("On Day 1, the accused steals the key from the residence of the owner of the business where the safe is kept. On Day 2, the accused uses the key to burglarize the business establishment and empty the safe.").

110. *See id.* at 1016 ("All of the acts are links in a chain ultimately leading to the accomplishment of the overall objective.").

111. *See id.* Imwinkelried describes this version as one in which a grand design or scheme cannot be readily identified, but it is clear that the bad acts are steps or stages in service of some greater plan. He contends that "proof that the accused carried out one act would be logically relevant on a noncharacter theory to prove that he executed another 'phase' or 'step' of the plan; the prosecutor would not have to rely on a generalized character inference." *Id.* However, a claim that some grand plan exists when it cannot be proven or is not readily obvious could have the same misleading characteristics that most problematic 404(b) evidence contains. It would incentivize the prosecutor to claim there was a plan and then make the case that all the bad acts were in furtherance of that plan. *Id.*

112. *See, e.g.*, David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215 (2011); Vivian M. Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent*

contention is that no matter what someone has done in the past, *present* intent is its own separate evaluation.[113] Evidence used in this manner offers possibly the greatest danger of both prejudice and an impermissible character inference, because it often presents in a way that is "logically indistinguishable from showing a propensity" to commit the charged act.[114] The relative probity of this evidence essentially turns on whether specific intent is a contested issue at trial and whether the defendant himself puts intent at issue.[115] Because intent is often one of the most contested issues at trial, and can be the hardest for the prosecutor to prove, its highly probative nature often cuts in favor of admissibility.[116] Therefore, intent evidence should be allowed only in the narrowest circumstances if it is to survive the character evidence prohibition.[117]

Prior bad act evidence used to show intent is often presented under the doctrine of chances.[118] This follows logically from the question: what are the chances the defendant lacked the intent based on this (or these) other act(s)?[119] In

Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice, 48 U. MIAMI L. REV. 451 (1993).

113. Sonenshein, *supra* note 112, at 217 ("[I]nferring 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.").

114. *Id.* at 218.

115. *Id.* at 226 ("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." (quoting United States v. Beechum, 582 F.2d 898, 914 (5th Cir. 1978)).

116. *See id.* at 232.

117. *Id.* at 276 ("[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."). No matter how problematic or prejudicial prior bad act evidence used to prove intent generally may be, because intent almost always has to be proven through circumstantial evidence, it must stay in 404(b). *See* Golden, *supra* note 77, at 193 ("[I]ntent must be established through the introduction of other evidence."). The Henthorn case offers a good example of the use of intent evidence. Mr. Henthorn claims that his wife fell and therefore he did not intend for her to die. Because he is putting his intent directly at issue, and proving his intent is central to the case, 404(b) evidence finds a good home.

118. *See* Rodriguez, *supra* note 112, at 459 ("The rationale that the government may offer evidence that the defendant committed a similar wrongdoing on other occasions to increase the probability of his intent to commit the charged crime is based on the doctrine of chances.").

119. Golden, *supra* note 77, at 193–94 ("The greater the similarity, the more

fact, it is perhaps the only way to present evidence of intent that is not merely presenting evidence of character in disguise. Intent evidence must be included under a narrow construction in combination with the doctrine of chances.

C. Knowledge

Proving knowledge is often essential in a criminal prosecution.[120] To prove knowledge of a specific thing (like what certain drugs look like), prior act evidence is probative to show that the knowledge existed in the mind of the defendant. It is another example of evidence that the jury can narrowly focus on without easily delving into character inferences.[121] Moreover, the "propensity to retain knowledge" is not the sort of impermissible propensity evidence prohibited by 404(b).[122]

But there are situations where evidence used to show knowledge can enter prejudicial waters, such as when a defendant asserts "mere presence" as a defense.[123] This situation often appears in receipt of stolen property cases, where evidence of a prior incident of receiving stolen property could be offered to show that, when charged with the same or a similar crime, the defendant knew the property was stolen.[124] The "mere presence" of the stolen property in the defendant's possession would not be enough to convict; the prosecution would have to prove knowledge. Again, like in most situations with 404(b) evidence, the more tenuous the connection between the prior bad act and the charged act, the greater danger for prejudice.[125] Because of this, 403 balancing should do the lion's share of work for knowledge evidence as part of the larger evidentiary safeguards that have been adopted.

likely the state of mind is held by the actor in performing both acts.").

120. *See* David P. Leonard, *The Use of Uncharged Misconduct Evidence to Prove Knowledge*, 81 NEB. L. REV. 115, 121–22 (2002).

121. *Id.* at 124 ("[T]he uncharged event or events themselves are so suggestive, and so similar to the charged event, that the inference of knowledge is easy to draw and the danger of unfair prejudice by jury misuse of the evidence is slight.").

122. *Id.* at 126.

123. *Id.* at 139.

124. *Id.* at 143.

125. *Id.* at 144 ("[T]he less similarity between the charged and uncharged acts, the weaker the inference of knowledge from one to the other, and the greater the risk that the jury will employ forbidden reasoning. It is in these types of cases that the kind of caution urged by commentators, and exhibited by some courts is most needed.").

Knowledge evidence is useful and makes both intuitive and practical sense. However, the utility of knowledge evidence also makes it more difficult to encourage courts to monitor such evidence as effectively as they should.[126] In other words, if the court decides the knowledge evidence is substantially more prejudicial than it is probative, then they should exclude it; otherwise, the evidence should go to the jury.[127]

D. The New 404(b)

This Comment proposes a new version of 404(b) that would essentially require the proponent to choose which specific purpose the evidence is being offered for—not several purposes, not all purposes. The jury can then focus on the *one* discrete purpose and determine if the evidence makes sense for that purpose. The potential for improper use and impermissible character inferences can then be reduced significantly. If the jury determines that the proffered purpose makes sense and was proven, they can graft the evidence onto the case-in-chief and deliver an informed verdict. For example, if the evidence is offered to show plan, the jury can focus on the plan objectively and determine: (1) if there was a plan, (2) if the 404(b) evidence fits into the plan, and (3) if the charged act also fits into the plan. This narrow, objective focus diminishes the chances of character determinations or the jury having to focus on a "trial within a trial." When the prior bad act is offered as proof of multiple purposes, the jury may decide it fits one, but not others, and be unsure of what that means for their deliberation. Or the jurors may take mental shortcuts and focus just on the bad act itself and make a character determination. They may treat the prior bad act as the real focus and hand down a conviction based on the prior act, not the current charged act. In that situation, 403 balancing becomes a toothless fiction.

The enumerated list should also be treated exhaustively and presented as such.[128] Instead of 404(b) stating that the

126. *See id.* at 168 (explaining both the failure of courts to monitor knowledge evidence properly, and the extreme importance that they do so).

127. *See* Fed. R. Evid. 403.

128. Rule 404(b) states in full:

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

evidence can be presented for purposes "such as . . . ," it should be written as "only . . . ," followed by the narrower enumerated list. The rule could be amended periodically with additional uses if the legislature deems something important had not been included. As this Comment shows, however, the enumerated list is followed almost exclusively. This proposal has the dual purpose of allowing all parties to focus on a discrete list of uses and signaling to the courts that the evidence should be carefully evaluated.

The danger of a "trial within a trial" is the perfect lens through which to examine the issues with, and potential solutions for, 404(b).[129] In that spirit, the standard the Supreme Court established for the introduction of 404(b) evidence in *Huddleston*—that no preliminary determination needs to be made—should be supplanted.[130] If prior bad acts were formally charged and brought to trial, they would require proof beyond a reasonable doubt to convict.[131] A lower standard for the introduction of 404(b) evidence, or no standard at all, results in evidence getting shoehorned into a trial through a lower burden of proof. A standard of clear and convincing evidence for prior bad acts should be adopted federally, as many states have chosen to do.[132] A clear and convincing evidence standard finds middle ground between no standard and the reasonable doubt standard required for criminal convictions. This protects the defendant from having to stand trial for a criminal charge without a significant showing by the prosecutor that a reasonable jury could have convicted with the evidence. Any lesser standard erodes the right of a defendant to receive a fair trial.

The doctrine of chances is essentially a thought exercise

> occasion the person acted in accordance with the character.
>
> (2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, or lack of accident.

Fed. R. Evid. 404(b).

129. *See* Meizlish, *supra* note 54.

130. Huddleston v. United States, 485 U.S. 681, 691 (1988).

131. Any prior bad acts that could have been charged as crimes would have required proof beyond a reasonable doubt if brought to trial.

132. Jason Tortora, *Reconsidering the Standards of Admission for Prior Bad Acts Evidence in Light of Research on False Memories and Witness Preparation*, 40 FORDHAM URB. L.J. 1493, 1511–12 (2013) (explaining that many states have rejected the *Huddleston* standard).

that attempts to boil down the evaluation of guilt to probabilities that focus on the act—not the actor—and can be applied to *any* of the enumerated 404(b) purposes. While the doctrine of chances can often utilize propensity reasoning, if the 404(b) evidence itself is carefully scrutinized, the harm the doctrine can do is limited. The final amended Federal Rule of Evidence 404(b) proposed by this Comment would read:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. The evidence may only be admitted as proof of motive, opportunity, intent, plan, knowledge, or identity.

Furthermore, to present the evidence to the jury, it must meet the clear and convincing evidence burden of proof to ensure a fair trial. This heightened burden of proof encourages judges to scrutinize the evidence. In order to examine the viability of this proposed rule, the next Part will apply its principles to *Henthorn*.

IV. APPLICATION TO *HENTHORN*

The case of *United States v. Henthorn* provided the impetus to reexamine 404(b) with a focus on clarity; this Part will analyze *Henthorn* with this Comment's proposed 404(b) to see if clarity can be found. As burdens of proof are central to evidentiary analysis, it is important to note that the 404(b) evidence in *Henthorn* was introduced by a preponderance of the evidence standard. The proposed rule would require a clear and convincing evidence standard.[133] While it is impossible to know whether the court would have admitted the evidence under a heightened standard, there are context clues that indicate the evidence would still have been admitted.[134]

133. This is technically a change to Fed. R. Evid. 104, but because it is critical to a 404(b) analysis, it is included in the proposal.

134. In the 404(b) Order, the court mentioned that the death of Lynn Henthorn, the first wife, is now being investigated as potential murder. The court's detailed evaluation of the reasons the evidence met the standard could also be used to surmise it would have come in under a higher standard as well. Order, *supra* note 55, at 4–6.

A. Intent in Henthorn

The proposed rule requires the government to choose *one* enumerated purpose under which to present the evidence. The government used three at trial: intent, plan, and absence of mistake or accident. For purposes of intent—combined with the doctrine of chances—the question would be: what are the chances that, in light of Lynn Henthorn's death, Mr. Henthorn did not intend for Toni Henthorn to die? Even if the jury were to believe that Lynn Henthorn's death was an accident, when presented with all the evidence from her death, the jury would certainly reframe how they would look at Toni Henthorn's death. Within the context of one wife dying in a terrible accident, or even having been killed, putting another wife in harm's way seems to indicate some level of intent. There appears to be enough context to show some level of intent here. At the very least, it appears Mr. Henthorn intended to put Toni in harm's way, perhaps hoping an accident would occur. Therefore, the chance that he was unaware of the danger, or oblivious to the real possibility of a tragic accident, appears low. Outside of an inference of general criminality, if the jury were allowed to focus on what his intent was for the hike generally, and where they went on the hike specifically, in light of the death of a prior wife, the jury could certainly presume he intended for her to die. Such an intent would be fairly damning for Mr. Henthorn. However, intent alone does not prove murder. Proof may require focusing on a plan instead.

B. Plan in Henthorn

If the government chose plan as its purpose for the evidence, then the evidence could fit under either the repeated choice model, the template model, or the linked acts model discussed in Section II.A.[135] Under the repeated choice model, the idea is that Mr. Henthorn thought: "My first wife died (regardless of how) and I collected money from it. That worked pretty well. I would like that again." His plan was not necessarily a grand scheme to kill multiple wives and collect insurance money. But when presented with the opportunity, perhaps after growing weary of the marriage, he referred back

135. *Supra* Section II.A.

to a prior methodology that worked and implemented it.

For the template model, that would require Mr. Henthorn to devise—prior to Lynn Henthorn's death—a template detailing how to get out of multiple marriages and collect insurance money. The two deaths would then be iterations of the same template and look much more like a grand scheme. With that template, it would be hard to say Mr. Henthorn suffered any prejudice at trial.

The linked acts model is a tougher fit. The two deaths are simply too far from each other in time to be part of one discrete plan. The plan would not really fit the sequential or chain models and would look more like a bizarre plan. The bizarre plan could present as: "my plan is to never be married longer than I want and to get paid when I leave." This would be the functional equivalent of the template model.

Imwinkelried saw the linked methodology models as having limited viability at best. In *Henthorn*, the repeated choice model would not have enough probative value to withstand challenge. Even if Mr. Henthorn was pleased at how Lynn's death worked out for him, that does not mean he either wanted Toni to die or contributed to her death. That leaves only the template model. This appears to be the exact kind of situation where the template model makes sense. Arguably, Mr. Henthorn at some point decided how he would beneficially end a marriage if that situation arose. The jury could focus on that one, specific, nuanced theory and determine if there was enough evidence to believe he had such a template. If they believed Mr. Henthorn adopted that template, that would likely be enough evidence to convict. If not, he likely would have been acquitted based on the scarcity of other evidence. This hypothetical shows how allowing the jury to focus on something simpler and more discrete narrows the analysis and reduces the chance that the jury will focus on character.

Absence of mistake or accident would obviously rebut the story offered by Mr. Henthorn that Toni slipped and fell. However, based on the specifics of the case, the doctrine would not serve any useful purpose that plan or intent would not. Claiming the death was no accident is essentially the same as saying that "he intended it" or "he planned it." *Henthorn* is a good demonstration of how it is difficult for "absence of mistake or accident" to do any independent work or be worthy of inclusion in the enumerated list.

Therefore, under the proposed rule, the government likely would have selected the template model of plan evidence. It would have had to argue that Mr. Henthorn did in fact develop a template and then show the jury how the deaths of Mr. Henthorn's wives were similar. At that point, the jury would have been presented with one question to decide and the answer to that question would determine the trial's outcome. Because of how narrow and specific the question would be, the danger of prejudice would be reduced.

While it is impossible to know how the jury would have handled that more specific question, this new proposed rule would have simplified the analysis and changed the framework of the trial for the better. Mr. Henthorn would have had to face the undisputed facts in the face of his peers with no confusion or character attacks. The current form of 404(b) is too readily reduced to confusion tactics, character inferences, and the Trojan-horsing of evidence over an artificially low burden of proof. *Henthorn* demonstrates that these issues are still prevalent for judges, attorneys, juries, and defendants.

CONCLUSION

Federal Rule of Evidence 404(b) is a constant source of consternation. *Henthorn* offers an opportunity to fully examine these issues and think more reasonably and logically about the realities of trials. In essence, juries are composed of subjective laypeople. The current rule allows for, if not encourages, use of confusion as a tool or trial strategy. Defendants should not be convicted because a juror or jury was confused. Defendants should be convicted because they committed a crime, not because they are "criminals." The government should develop a more nuanced theory to introduce 404(b) evidence in order to ensure that the evidence is viable. The government should not be able to throw whatever they can at the jury in hopes of a conviction. But the government should be able to use a defendant's past to shed light on dark corners of a case in order to serve justice.

What courts need is a balanced approach that keeps all stakeholder interests in mind. The amended 404(b) presented by this Comment attempts to do that through simplicity and pragmatism. We ask our peers to be the gatekeepers of justice and decide our guilt and innocence.

We owe it to them and to ourselves to make that task more intuitive, more just, and more focused.