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## They Did It Before, They Must Have Done It Again; The Seventh Circuit's Propensity To Use a New Analysis of 404(B) Evidence

Antonia M. Kopec

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# THEY DID IT BEFORE, THEY MUST HAVE DONE IT AGAIN; THE SEVENTH CIRCUIT'S PROPENSITY TO USE A NEW ANALYSIS OF 404(B) EVIDENCE

## INTRODUCTION

In 2010, federal agents of the U.S. Drug Enforcement Agency (DEA) conducted an investigation into a cocaine distribution ring operation in Chicago and Milwaukee.<sup>1</sup> The agents suspected Nicolas Gomez of involvement.<sup>2</sup> As part of their investigation, agents placed a wiretap device on the phone of a known Chicago drug supplier, Robert Romero, which, in turn, revealed the name of the reseller, “Guero,” who lived in Milwaukee.<sup>3</sup> In fact, the cell phone number Guero used was registered to a residence in Milwaukee, which is where Gomez and his brother-in-law, Reyes, lived.<sup>4</sup> After several months of monitoring, federal agents determined a transaction pattern whereby Romero and Guero arranged a cocaine sale over the phone. GPS data then tracked Romero’s trips from Chicago to an alley behind Gomez’s house.<sup>5</sup>

Finally, federal agents saw their chance to catch the conspirators in the act on September 2, 2010, when Romero and Guero discussed a sale for the next day.<sup>6</sup> The agents followed Romero as he drove from Chicago to Milwaukee and parked his car on a side street very near Gomez’s residence.<sup>7</sup> The two men had a brief conversation next to Romero’s car and then left the scene on foot going in opposite directions.<sup>8</sup> Unfortunately, for Gomez, his course took him past the DEA agents who pretended to be part of an antigun task force and stopped him to ask questions about his identity.<sup>9</sup> The phone number Gomez gave was the same number that Guero previously used that day to arrange the sale.<sup>10</sup> The agents watched as Gomez then got into a

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1. *United States v. Gomez*, 763 F.3d 845, 850 (7th Cir. 2014) (en banc).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.* at 850–51.

7. *Gomez*, 763 F.3d at 851.

8. *Id.*

9. *Id.*

10. *Id.*

green minivan, picked up Romero several blocks down, and drove to a nearby restaurant where they met Reyes, Gomez's brother-in-law.<sup>11</sup>

After their meeting, the three men went their separate ways.<sup>12</sup> Reyes left driving a tan colored Suburban, which was stopped and identified by a DEA agent.<sup>13</sup> "Gomez and Romero must've been spooked" because neither of them returned to Romero's car.<sup>14</sup> Instead, Romero took a lengthy cab ride back to Chicago.<sup>15</sup> Later that day the agents seized Romero's car—which was still parked where he had left it—and found a quarter kilogram of cocaine in the trunk.<sup>16</sup> Phone calls from that evening and the next morning revealed Romero and Guero frantically reviewing the events of the day.<sup>17</sup> During the calls, Guero stated that police stopped his brother-in-law while he was driving away, which was exactly what happened to Reyes.<sup>18</sup> Guero also stated that the police had stopped him while he was walking to his car, which was precisely what happened to Gomez.<sup>19</sup> About four weeks later, DEA agents arrested Gomez at his home, and, while conducting a search, they found a small quantity of cocaine in a pair of pants that were found in Gomez's bedroom.<sup>20</sup>

During his trial, "Gomez's defense was mistaken identity—he . . . was . . . in the wrong place at the wrong time[.]" and, instead, it was Reyes who was Romero's coconspirator.<sup>21</sup> Using Federal Rule of Evidence 404(b)(2), the government introduced the small amount of cocaine found in the pants that were discovered in Gomez's bedroom at the time of his arrest to evidence Gomez's identity as Guero.<sup>22</sup> The trial court admitted the evidence, and the jury ultimately convicted him on all counts.<sup>23</sup> Gomez appealed his conviction, challenging the admission of the other act evidence.<sup>24</sup> The Seventh Circuit, sitting en banc, found the evidence "extremely weak" but ultimately affirmed his conviction.<sup>25</sup> In doing so, the Seventh Circuit issued an opinion

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11. *Id.*

12. *Id.*

13. *Gomez*, 763 F.3d at 851.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Gomez*, 763 F.3d at 851.

20. *Id.*

21. *Id.* at 852.

22. *Id.* See generally FED. R. EVID. 404(b)(1).

23. *Gomez*, 763 F.3d at 852.

24. *Id.*

25. *Id.* at 864.

changing the existing case law regarding Rule 404(b) evidence, which created an entirely new game for proponents of this evidence.<sup>26</sup>

Rule 404 is sometimes referred to as the “character rule.”<sup>27</sup> However, this title is misleading, and it is very important to understand how this Rule actually works before proceeding further.<sup>28</sup> Rule 404 has two subparts, (a) and (b), and each have separate purposes. Generally, Rule 404(a) bars evidence of a person’s character that shows that on a particular occasion, the person acted in accordance with the character or trait.<sup>29</sup> However, this type of evidence is admissible in a criminal case, and Rule 404(a) lays out who may offer it.<sup>30</sup> Rule 404(a) works in conjunction with Rule 405(a), which provides that evidence of a person’s character may only be offered through reputation or opinion.<sup>31</sup> On the other hand, Rule 404(b) discusses the admission of evidence of prior crimes, wrongs, or acts that prove a *relevant* issue of the case.<sup>32</sup> Therefore, calling Rule 404 the “character rule” is a misnomer, because Rule 404(a) is the only part that deals with character evidence, whereas Rule 404(b) deals with evidence relating to an element of the charge.<sup>33</sup> The prosecution in *United States v. Gomez*<sup>34</sup> sought to introduce the evidence of the cocaine to establish an element of the charge: Gomez’s identity.<sup>35</sup>

The evidence in *Gomez* was impermissible propensity evidence<sup>36</sup> in disguise—a product of the misapplication of multipart tests for admissibility.<sup>37</sup> In its opinion, the Seventh Circuit noted: “Especially in drug cases like this one, other-act evidence is too often admitted almost automatically, without consideration of the ‘legitimacy of the

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26. *Id.* at 853 (reasoning that the test for evaluating the admissibility of evidence was no longer useful and introducing a different approach for clarity).

27. See generally THOMAS A. MAUET & WARREN D. WOLFSON, TRIAL EVIDENCE 75–123 (5th ed. 2012) (discussing the two character trait rules under Rule 404 and 405: the essential element rule and the circumstantial evidence rule).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. See generally MAUET & WOLFSON, *supra* note 27.

34. 763 F.3d 845 (7th Cir. 2014) (en banc).

35. *Id.* at 852.

36. Throughout this Comment the term “propensity evidence” is used alongside of “character evidence.” However, these two should not be confused because character evidence refers solely to evidence of a person’s character, while propensity evidence takes it one step further and suggests that because the accused has a particular character trait, she most likely acted on that character trait again and committed the alleged offense. Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 778 (2013).

37. See *Gomez*, 763 F.3d at 853.

purpose for which the evidence is to be used and the need for it.’”<sup>38</sup> Federal Rule of Evidence 404(b) is the most cited Rule of Evidence, demonstrating its complexity and difficulty in applying a proper analysis at the trial level.<sup>39</sup> The prosecution, particularly in drug cases, overwhelmingly uses this rule.<sup>40</sup> Additionally, cases have also overwhelmingly demonstrated the misapplication of the Rule, prompting a need for a change.<sup>41</sup>

This Comment argues that the Seventh Circuit changed the law in both *United States v. Miller*<sup>42</sup> and *Gomez* by creating a rules-based framework for the admissibility of other crimes evidence under Rule 404(b), which differs from the former checklist test. The rules-based approach is more appropriate because the former checklist test tended to support a mere automatic admission of other crimes evidence. The new test refocuses the issue on relevancy by conflating Rules 402 and 403 with the requirement that the proponent articulate a relevant purpose for the evidence. Although the new test ignores the “sole purpose” standard derived from *Huddleston v. United States*,<sup>43</sup> the rules-based approach nonetheless reflects the concerns and protections presented in *Huddleston*. Thus, just as the Third Circuit has already done, all of the federal circuit courts of appeals should adopt this test to promote uniformity, efficiency, and fairness in deterring propensity evidence, and, in addition, this rules-based approach should be modified to begin with the “sole purpose” standard to better ensure fundamental fairness.

Part II of this Comment explores the background of Federal Rule of Evidence 404(b) in the U.S. legal system, including its current use and understanding.<sup>44</sup> Part III argues that the Seventh Circuit has changed the existing law regarding the admissibility of Rule 404(b) evidence in *Miller* and *Gomez*.<sup>45</sup> Part III also explores why the previous checklist test is no longer applicable, and why the new rules-based framework is more appropriate.<sup>46</sup> Part IV examines the impact the

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38. *Id.* (quoting *United States v. Miller*, 673 F.3d 688, 692 (7th Cir. 2012)).

39. Ashley Hinkle, Comment, *Every Consumer Knows How To Run a Business: The Dangerous Assumptions Made When a Prior Possession Conviction Is Admitted as Evidence in a Case Involving Commercial Drug Activity*, 35 N. ILL. U. L. REV. 401, 405 (2015).

40. *Id.* (noting that on appeal, Rule 404(b) is the most challenged evidentiary rule, illustrating the continued misapplication of the rule).

41. Daniel P. Ranaldo, Note, *Is Every Drug User a Drug Dealer? Federal Circuit Courts Are Split in Applying Fed. R. Evid. 404(b)*, 8 FED. CTS. L. REV. 147, 149 (2014).

42. 721 F.3d 435 (7th Cir. 2013).

43. 485 U.S. 681 (1988).

44. See *infra* notes 49–208 and accompanying text.

45. See *infra* notes 209–40 and accompanying text.

46. See *infra* notes 241–292 and accompanying text.

new test will have, particularly in regard to circuit uniformity, and the reliance on limiting instructions.<sup>47</sup> Part V concludes that the new test advanced by the Seventh Circuit in *Gomez* has changed the way all courts will analyze the admissibility of evidence under Rule 404(b), and although the test is still within the broader holding of *Huddleston*, it should still include the sole purpose test.<sup>48</sup>

## II. BACKGROUND

The Federal Rules of Evidence were adopted by order of the U.S. Supreme Court on November 20, 1972<sup>49</sup> and became effective July 1, 1973.<sup>50</sup> The rules were enacted to govern the admission of evidence for the U.S. district courts in trial proceedings.<sup>51</sup> Federal Rule of Evidence 404 (Rule 404) regulates the admissibility of evidence relating to a person's character.<sup>52</sup> Subsection 404(a) addresses conformity with an individual's character traits,<sup>53</sup> while Subsection 404(b) addresses the admission of crimes, wrongs, or other acts (other crimes evidence) for limited purposes that bear on relevant issues of a crime.<sup>54</sup> This Comment focuses on Rule 404(b) other crimes evidence and will begin with: (1) a brief history of the origins of the character evidence rule through England and into U.S. law;<sup>55</sup> (2) the modern application of this rule as applied in *United States v. Huddleston*;<sup>56</sup> (3) how the federal courts followed the *Huddleston* analysis;<sup>57</sup> (4) the criticism received by the modern application of the rule;<sup>58</sup> and, lastly, (5) the rationale for the exclusion of other crimes evidence in criminal trials.<sup>59</sup>

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47. See *infra* notes 293–354 and accompanying text.

48. See *infra* notes 355–57 and accompanying text.

49. 8 MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE 3 (7th ed. 2014).

50. *Id.*

51. *Id.*

52. FED. R. EVID. 404.

53. *Id.* at 404(a). Rule 404(a) is not applicable to civil cases. *Id.* at 404 advisory committee's note to 2006 amendments. *Id.* at 404.

54. *Id.* at 404(b). Thus, it is important to understand the differences between Rule 404(a) and Rule 404(b). See *supra* notes 27–33 and accompanying text (describing these differences).

55. See *infra* notes 60–124 and accompanying text (providing a brief history of the character evidence rule as it developed in England and then into law in the United States).

56. See *infra* notes 125–46 and accompanying text (providing an example of the modern application of this rule as seen in *Huddleston v. United States*).

57. See *infra* notes 147–57 and accompanying text (explaining how the federal circuit courts have followed the modern application of the Supreme Court's analysis in *Huddleston*).

58. See *infra* notes 158–78 and accompanying text (detailing the criticism that the modern application of the rule by the federal courts has received).

59. See *infra* notes 179–240 and accompanying text (explaining why it is necessary to have a rule that excludes this evidence in a criminal or civil trial).

### A. *Origins of the Character Evidence Rule*

Because most of U.S. law is rooted in English law, it is helpful to understand the use of other crimes evidence in the English courts.<sup>60</sup> As a preliminary matter, it is important to understand Rule 404(b) as a rule of either exclusion or inclusion.<sup>61</sup> Professor David Leonard suggests: “This dichotomy between a rule of exclusion with narrow exceptions and a rule of admission with a single exception is not merely one of form. It is important analytically because the way the rule is formulated will often affect the outcome of particular admissibility questions.”<sup>62</sup> The exclusionary form of the rule excludes all evidence suggesting propensity except evidence that is admissible to prove a relevant issue of the crime (e.g., intent, motive, or knowledge).<sup>63</sup> On the other hand, the inclusionary form admits all evidence that is relevant except evidence that suggests propensity.<sup>64</sup> As Part II.B. demonstrates, it is important to keep these formulaic distinctions in mind when analyzing courts’ recent interpretations of an admissibility test for this kind of evidence.<sup>65</sup>

#### 1. *Rule Development in England*

The first rule relating to admission of character and other crime evidence “appeared in English courts during the Restoration Period and around the same time as the hearsay rule.”<sup>66</sup> By the beginning of the nineteenth century, a rule against evidence relating to character was established in England;<sup>67</sup> however, a rule concerning other crimes evidence had not yet been formulated.<sup>68</sup> Prior to the mid-nineteenth century, the cases show that courts followed a more inclusionary approach.<sup>69</sup> The inclusionary form presumed that the other crimes evidence was admissible as long as the evidence was relevant for more than the forbidden propensity purpose, that is, to show the defendant was more likely to commit the crime.<sup>70</sup>

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60. DONALD P. LEONARD, *THE WIGMORE A NEW TREATISE ON EVIDENCE: EVIDENCE OF OTHER MISCONDUCT AND SIMILAR EVENTS* § 2.1, at 19 (Richard D. Friedman ed. 2009).

61. *Id.*

62. *Id.* § 2.1, at 18.

63. *See id.* § 2.1.

64. *Id.*

65. *See infra* notes 125–46 and accompanying text.

66. Milich, *supra* note 36, at 777.

67. LEONARD, *supra* note 60, § 2.1, at 18.

68. *Id.*

69. *Id.* § 3.2, at 75.

70. Hinkle, *supra* note 39, at 404.

During the mid-nineteenth century, however, English courts preferred an exclusionary form.<sup>71</sup> The exclusionary form presumed “that evidence is inadmissible unless it is relevant for a specific purpose.”<sup>72</sup> The U.S. courts initially adopted the inclusionary form due to the mistaken belief that it was the English common law rule.<sup>73</sup> In both countries, literature mischaracterizes the issue as one of categorization by type of case and purpose for which the evidence is offered, instead of seeking an articulated, unifying theory through which other crimes evidence can be admitted or excluded.<sup>74</sup> Unfortunately, because of the lack of a unifying theory, this “has led the courts to approach the problem from a pigeonholing perspective rather than from standards that would emerge from an analysis of the relevance of this type of evidence, the probative value of the evidence, and the dangers such evidence poses.”<sup>75</sup> As a result, courts struggled to properly apply an appropriate test, which was carried over to early American law.

## 2. *Rule Development in the United States*

In the United States, the development of rules governing the admission of other crimes evidence was similar to the development in England.<sup>76</sup> Like England, early U.S. courts also excluded any evidence of uncharged misconduct.<sup>77</sup> Early U.S. courts clearly relied on the English commentators and typically cited to English cases in their opinions and decisions.<sup>78</sup> Prior to the mid-nineteenth century, U.S. courts, similar to English courts, recognized a rule of inclusion, admitting any uncharged misconduct evidence unless it was used to establish character conformity.<sup>79</sup> Then, around 1850, U.S. courts began

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71. *Id.*

72. *Id.*

73. *Id.* at 404–05.

74. LEONARD, *supra* note 60, § 2.2, at 19.

75. *Id.* § 2.4.3, at 72. Throughout this Comment the terms “other crimes” and “uncharged misconduct” are frequently used. “Other crimes” refers to previous convictions, while “uncharged misconduct” refers to offenses for which the defendant was never formally charged and may include arrests for such offenses.

76. *Id.* § 3.1.

77. *Id.* Julius Stone, a leading scholar in this area, explained that there was a common belief among judges and text writers, which has rarely been questioned since it began around 1850, that in the beginning the law said no similar facts would be admitted. “So great, runs the thought, was the solicitude of the common law to avoid damning the accused with prejudice, diffusion, and confusion of issues that, however relevant and on whatever issue, similar facts and, above all, similar bad acts of the accused were never admitted.” *Id.* § 3.1, at 74 (quoting Julius Stone, *The Rule of Exclusion of Similar Fact Evidence: America*, 51 HARV. L. REV. 988, 989 (1938)).

78. *Id.* § 3.1. See generally *id.* § 3.2 (providing an analysis of early U.S. commentators and their development).

79. *Id.* § 3.2, at 75.



using an exclusionary form of the rule with narrow exceptions.<sup>80</sup> The trend that developed during this time was that the courts were willing to allow the introduction of uncharged misconduct evidence when it was most needed, for example when the accused denied knowledge of a material fact and the uncharged misconduct proved he had prior knowledge of that particular fact.<sup>81</sup> As courts asserted the need for this evidence, however, they typically began their analysis by recognizing the “fundamental ban on the use of character as circumstantial evidence of *conduct*.”<sup>82</sup> This type of evidence was offered for both civil and criminal cases, and it was offered for the same purposes (i.e., for instance to prove relevant issues in the case, such as the necessary state of mind).<sup>83</sup> In their analysis, the courts looked to the type of action of the uncharged misconduct and the purpose for which it was offered.<sup>84</sup>

### 3. *People v. Molineux*

The language used in Federal Rule of Evidence 404(b) can be traced back to an early New York case,<sup>85</sup> *People v. Molineux*.<sup>86</sup> *Molineux* involved a prosecution for the homicide of Katherine Adams, a New York City resident.<sup>87</sup> The alleged culprit sent a bottle of Bromo Seltzer medicine laced with cyanide and mercury to Harry Cornish, the Athletic Director of the Knickerbocker Athletic Club.<sup>88</sup> Cornish took the bottle home and offered it to his landlady, Katherine Adams, who was complaining of a headache.<sup>89</sup> She became deathly ill from the medicine and immediately died after taking it.<sup>90</sup> Previously, that Fall, a bottle of the same medicine was sent to Henry A. Barnet, a member of the same athletic club.<sup>91</sup> He took the medicine to cure an upset stomach and became deathly ill.<sup>92</sup> Barnet died within two weeks of consuming the same rare poison that killed Katherine Ad-

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80. LEONARD, *supra* note 60, § 3.1, at 74.

81. *Id.*

82. *Id.* § 3.1, at 75 (emphasis added).

83. *Id.* § 3.3, at 101.

84. *Id.*

85. Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 202 (2005).

86. 61 N.E. 286 (N.Y. 1901).

87. Reed, *supra* note 85, at 202. This case summary is derived from Reed's account. See *id.* at 202–03. See *Molineux*, 61 N.E. at 286, for the full case and text.

88. Reed, *supra* note 85, at 202 (citing *Molineux*, 61 N.E. at 287).

89. *Id.* (citing *Molineux*, 61 N.E. at 287).

90. *Id.* at 202–03 (citing *Molineux*, 61 N.E. at 287).

91. *Id.* at 203 (citing *Molineux*, 61 N.E. at 289–90).

92. *Id.* (citing *Molineux*, 61 N.E. at 289–90).

ams.<sup>93</sup> Roland Molineux, a chemist, had motive to kill both “Barnet and Cornish: Barnet for trying to [steal] Molineux’s fiancé” and “Cornish for crossing him at various club events.”<sup>94</sup> During Molineux’s trial for the death of Katherine Adams, the prosecution introduced other crimes evidence, including evidence that he was the likely perpetrator in Barnet’s death.<sup>95</sup> Molineux was convicted, and he appealed.<sup>96</sup> His appeal was successful, and he was acquitted on retrial during which no facts regarding the the Barnet killing were admitted into evidence.<sup>97</sup>

On appeal, Judge William E. Werner produced a general rule for the admission or exclusion of other crimes evidence. Judge Werner wrote: “The general rule of evidence applicable to criminal trials is that the state cannot prove against a defendant any crime not alleged in the indictment, either as a foundation for a separate punishment, or as aiding the proofs that he is guilty of the crime charged.”<sup>98</sup> However, Judge Werner then went on to state that, in general, other crimes evidence is proper to prove the specific crime charged when it aids in establishing:

- (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; [and] (5) the identity of the person charged with the commission of the crime on trial.<sup>99</sup>

Judge Werner’s rule resembled an exclusionary rule with a limited number of exceptions for admission of this evidence.<sup>100</sup> Nearly all of the early commentators (except Wigmore), accepted Judge Werner’s formulation as defining the rule’s limits.<sup>101</sup> The rule was formulated as a general exclusion against proof of the accused’s other bad acts unless the other bad acts fit one of the pigeonholed exceptions men-

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93. *Id.* (citing *Molineux*, 61 N.E. at 289–90).

94. Reed, *supra* note 85, at 203 (citing *Molineux*, 61 N.E. at 288–90).

95. *Id.* (citing *Molineux*, 61 N.E. at 290–93).

96. *Id.* (citing *Molineux*, 61 N.E. at 287).

97. *Id.*

98. *Molineux*, 61 N.E. at 293 (citing JOEL PRENTISS BISHOP, LL.D, 1 NEW CRIMINAL PROCEDURE OR NEW COMMENTARIES ON THE LAW OF PLEADING AND EVIDENCE AND THE PRACTICE IN CRIMINAL CASES § 1120, at 696 (4th ed. 1895)). The court justified the reasoning, stating that the rule, widely recognized and firmly established, is “the product of that same humane and enlightened public spirit which, speaking through our common law, has decreed that every person charged with the commission of a crime shall be protected by the presumption of innocence until he has been proven guilty beyond a reasonable doubt.” *Id.* at 293–94.

99. *Id.* at 294.

100. Reed, *supra* note 85, at 203.

101. *Id.* at 204. *Molineux* is “still considered good law today by New York Courts.” LEONARD, *supra* note 60, § 3.3, at 103–04.

tioned *supra*.<sup>102</sup> There was a significant debate among the courts as to whether they should add other exceptions to the rule.<sup>103</sup> Courts also debated over the necessary level of proof the prosecution needed to establish with regard to other crimes before the jury could hear the evidence.<sup>104</sup> This same debate was also present during the codification of the rule in the Federal Rules of Evidence.

#### 4. Codification of the Rule

In 1938, the U.S. Attorney General challenged the American Law Institute to create a Model Rules of Evidence.<sup>105</sup> The first formulation of the uncharged misconduct rule took an inclusionary form and allowed other crimes evidence to be admitted, but only if the evidence was relevant to prove the accused's disposition to commit the instant offense, or to commit crimes or wrongs generally.<sup>106</sup> However, in practice, the law was often assumed to be otherwise.<sup>107</sup> Ultimately, no jurisdiction adopted the Model Rule of Evidence.<sup>108</sup> The Uniform Rule, which was adopted in 1953, took a different approach, "exhibiting elements of both the exclusionary and inclusionary [form]."<sup>109</sup> That version began with an explicit exclusion of other crimes evidence, but "subject to Rules 45 and 48, this evidence is admissible when relevant to prove some other material fact including absence of mistake or accident, motive, opportunity, intent, preparation, plan, knowledge or identity."<sup>110</sup> A final version of the Federal Rules of Evidence was eventually adopted in 1975.<sup>111</sup>

All of the federal courts follow the Federal Rules of Evidence, and most states have adopted a similar version of Rule 404(b).<sup>112</sup> The provisions of the Model Code and the Uniform Rule influenced Rule

102. Reed, *supra* note 85, at 204.

103. *Id.* Some courts considered this as "an exception for evidence of flight from authorities as consciousness of guilt." *Id.* In cases involving sex offenses, some courts added an exception to permit evidence of other sexual offenses. *Id.* at 205.

104. *Id.*

105. *Id.*

106. *Id.* at 206 (quoting CODE OF EVID. R. 411, at 119 (Am. Law Inst. Tentative Draft No. 2, 1941)).

107. *Id.* (quoting CODE OF EVID. R. 411, at 119 (Am. Law Inst. Tentative Draft No. 2, 1941)).

108. Reed, *supra* note 85, at 204.

109. LEONARD, *supra* note 60, § 4.3.2, at 224.

110. *Id.* § 4.3.2, at 224-25 (quoting UNIF. R. EVID. 55).

111. Pub. L. 93-595, §1, 88 Stat. 1932, 1926 (1975).

112. All states embrace a form of Rule 404(b) except Connecticut, Georgia, Illinois, Massachusetts, Missouri, New York, and Virginia. These states maintain a formula of the rule as one of inadmissibility followed by a "list of judicially-recognized exceptions to the rule." Reed, *supra* note 85, at 240. See LEONARD, *supra* note 60, at 795-808, for a complete list of comparable state statutes.

404(b).<sup>113</sup> The rule is neither solely exclusionary nor solely inclusionary;<sup>114</sup> however, according to the Notes of Committee to the Judiciary, it seems that Congress intended to embrace the inclusionary form.<sup>115</sup>

Federal Rule of Evidence 404(b) states:

(b) Crimes, Wrongs, or Other Acts.

(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.<sup>116</sup>

The rule begins with a prohibition, which may, at first, seem exclusionary, but it is in fact a restatement of Rule 404(a), which provides evidence used to prove character conformity is inadmissible.<sup>117</sup> The next sentence then takes an inclusionary approach,<sup>118</sup> stating that this evidence is admissible for other purposes, “such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”<sup>119</sup> The use of the words “such as” indicates that the following list of exceptions is not exclusive.<sup>120</sup> By saying that the evidence *may* be admissible, the language suggests that the decision to admit is discretionary, as supported by the Notes of Advi-

113. LEONARD, *supra* note 60, § 4.3.2, at 225.

114. *Id.*

115. H.R. REP. NO. 93-650, at 7 (1973). The Committee amended the Rule 404(b) draft language beginning with these words: “this subdivision does not exclude the evidence when offered[.]” to instead read, “[i]t may, however, be admissible.” *Id.* (citing FED. R. EVID. 404(b)). These are “the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.”

*Id.* Likewise, the Senate Report No. 93-1277 wrote that the committee “anticipates that the use of the discretionary word ‘may’ with respect to the admissibility of evidence of crimes, wrongs or acts is not intended to confer any arbitrary discretion on the trial judge.” The hope was that with regard to the permissible uses for such evidence, the trial judge would exclude such evidence only on the basis of Rule 403 considerations. S. REP. NO. 93-650, at 7 (1974).

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

117. LEONARD, *supra* note 60, § 4.3.2, at 226.

118. *Id.*

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

120. *Id.*

sory Committee on Rules.<sup>121</sup> Federal courts in all circuits have characterized the rule as inclusionary, and almost all states follow the same view.<sup>122</sup> However, some courts have spoken of the rule in an exclusionary manner, and it is possible to “find inconsistent statements about the nature of the rule within the same Circuit.”<sup>123</sup> Thus, it is important to understand the difference between the exclusionary and inclusionary form because the formulation will influence the admissibility of this evidence as illustrated in the modern application of the rule.<sup>124</sup>

*B. A Modern Application of the Rule: Huddleston v. United States*

The U.S. Supreme Court addressed the admissibility of Rule 404(b) evidence in *Huddleston*.<sup>125</sup> Guy Huddleston was charged with selling stolen goods in interstate commerce and possessing stolen property in interstate commerce.<sup>126</sup> The charges related to a shipment of Memorex videocassette tapes that was stolen between April 11 and 15, 1985, which Huddleston allegedly sold despite knowing they were stolen.<sup>127</sup>

At trial, neither party disputed that the tapes were stolen.<sup>128</sup> Instead, Huddleston claimed that he did not know that the tapes were stolen.<sup>129</sup> The district court permitted the government to introduce evidence of similar acts under Rule 404(b) to establish Huddleston’s knowledge in this participant’s offense.<sup>130</sup> This evidence indicated that on a prior occasion, Huddleston offered to sell new, twelve-inch, black and white televisions for a questionably low price of \$28 apiece.<sup>131</sup> Further evidence showed that an undercover FBI agent previously arrested Huddleston after he sold the FBI agent appliances that were later discovered to be a part of a stolen shipment.<sup>132</sup> During closing arguments, the district court “instructed the jury that the similar acts evidence was to be used only to establish [Huddleston’s]

121. *Id.* The rule does not require that the evidence be excluded in this situation: “No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403.” FED. R. EVID. 404 advisory committee’s note.

122. LEONARD, *supra* note 60, § 4.3.2, at 227.

123. *Id.* § 4.3.2, at 227–28.

124. *Id.* § 4.3.2, at 228.

125. *Huddleston v. United States*, 485 U.S. 681 (1988).

126. *Id.* at 682.

127. *Id.*

128. *Id.* at 683.

129. *Id.*

130. *Id.*

131. *Huddleston*, 485 U.S. at 683.

132. *Id.*

knowledge, and not to prove his character.”<sup>133</sup> The jury convicted Huddleston on the charge of possession, and he appealed.<sup>134</sup>

The U.S. Court of Appeals for the Sixth Circuit reversed the conviction, concluding that the district court erred in admitting testimony relating to the stolen televisions because the government had failed to establish by clear and convincing evidence that they were stolen in the first place.<sup>135</sup> The U.S. Supreme Court granted certiorari to determine whether the trial court must make a preliminary finding relating to the similar act evidence before it is submitted to the jury.<sup>136</sup>

The Court held that the question of whether the trial court must make a preliminary finding that the person actually committed the uncharged act is governed by Rule 104(b), under which the evidence is admissible if the court determines that there is “sufficient evidence to support a finding” that the alleged conduct occurred.<sup>137</sup> The Court further discussed the concerns of Rule 404(b) evidence.<sup>138</sup> The Court held that Rule 404(b) prohibits the introduction of extrinsic act evidence when the sole purpose of introducing that evidence is to prove character propensity.<sup>139</sup> Otherwise, subject to other limitations, this evidence may be admitted for other purposes.<sup>140</sup> The Court then further clarified the protections provided by the Federal Rules of Evidence against unfair prejudice associated with this kind of evidence. The court noted that four other sources protect against unfair prejudice.<sup>141</sup> Those four sources stem from: (1) the Rule 404(b) requirement that the evidence be offered for a proper purpose; (2) Rule 402, which mandates that the evidence is relevant; (3) Rule 403, which requires that the trial judge conduct a proper balancing test to determine whether the probative value of the evidence substantially outweighs any unfair prejudice; and (4) Rule 105, which provides that the trial judge shall, upon request, issue a limiting instruction to the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted.<sup>142</sup>

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133. *Id.* at 684. The district court gave a limiting instruction. See generally FED. R. EVID. 105 (“If the court admits evidence that is admissible against a party or for a purpose—but not against another party or for another purpose—the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.”).

134. *Huddleston*, 485 U.S. at 684.

135. *Id.*

136. *Id.* at 685.

137. *Id.* at 685–91.

138. *Id.* at 687.

139. *Id.*

140. *Huddleston*, 485 U.S. at 687.

141. *Id.* at 691–92 (citation omitted).

142. *Id.*

In so holding, “[t]he Court explicitly recognized the danger of unfair prejudice and outlined the steps the trial court must take in determining admissibility of any such evidence under Rule 404(b).”<sup>143</sup> This approach suggests that the rule is inclusionary, meaning that evidence is potentially admissible unless offered for the sole purpose of propensity.<sup>144</sup> However, these four factors established by the *Huddleston* Court provided a roadmap for the federal courts to follow.<sup>145</sup> Further, lower federal courts have adopted more specific standards for admitting this evidence.<sup>146</sup>

### C. Federal Circuit Courts Follow Suit

Many courts ignore the sole purpose test set forth in *Huddleston* and, instead, have adopted checklist type tests reflecting the second part of the holding, which have caused the “mere automatic admission effect.”<sup>147</sup> The federal appellate courts have all adopted tests with subtle variations, whether it be a two, three, or four-part test.<sup>148</sup> All circuits recognize that the evidence must serve a relevant purpose under Rule 402, and that the evidence must not be unfairly prejudicial under Rule 403.<sup>149</sup> Some courts added additional elements to the test.<sup>150</sup> The Third Circuit, in addition to incorporating the above-mentioned considerations, has held that “the proponent must clearly articulate how that evidence fits into a chain of logical inferences, no link of which may be the inference that the defendant has the propensity to commit the crime charged.”<sup>151</sup> As will be discussed *infra*, this addition to the test is particularly influential and important in admitting this evidence.<sup>152</sup>

Before 2012, the U.S. Court of Appeals for the Seventh Circuit applied a four-part checklist test that reflected elements of *Huddleston* but also contained additional considerations. Other crimes evidence is properly admitted if the evidence: “(1) tends to establish a matter at issue other than the defendant’s propensity to commit the crime charged; (2) is sufficiently similar and close in time to the matter at

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143. LEONARD, *supra* note 179, § 4.5.1, at 245.

144. *Id.* § 4.7, at 278–79.

145. *Id.* § 4.7, at 279.

146. *Id.* § 4.5.1, at 245.

147. *See* United States v. Miller, 673 F.3d 688, 696, 698 (7th Cir. 2012).

148. LEONARD, *supra* note 179 § 4.7.

149. *Id.* § 4.7, at 277–78.

150. *Id.* § 4.7, at 277–79.

151. United States v. Morley, 199 F.3d 129, 133 (3d Cir. 1999) (quoting United States v. Himelwright, 42 F.3d 777, 782 (1994)); *see also* United States v. Caldwell, 760 F.3d 267, 277–78 (3d Cir. 2014).

152. *See infra* notes 248–60 and accompanying text.

issue to be relevant; (3) supports a jury finding that the defendant committed the similar act; and (4) has probative value that substantially outweighs the danger of unfair prejudice.”<sup>153</sup> The test reflected a checklist because as long as the evidence met each requirement, it would most likely get in.<sup>154</sup>

Other than the additional factors of similarity and timing to establish relevance, the test is in accord with the *Huddleston* framework, and is inclusionary in nature.<sup>155</sup> Additionally, the Seventh Circuit has stressed that the proponent of the evidence must make clear the theory under which the evidence is being offered.<sup>156</sup> However, this approach received a lot criticism and in 2012, the Seventh Circuit adopted a different approach.<sup>157</sup>

#### D. Rule 404(b) is Heavily Criticized

Rule 404(b) has become especially helpful and frequently used by the prosecution in cases involving the possession of a controlled substance with the intent to distribute.<sup>158</sup> “[E]specially in drug cases, few defendants are new to criminal activity and the range of possible defenses is fairly limited,” thus, “three of the permitted purposes in the rule—knowledge, intent, and identity—are routinely in play.”<sup>159</sup> However, the rule has come under much criticism by courts<sup>160</sup> and legal scholars.<sup>161</sup> Courts have rationalized the widespread admission

153. *United States v. Brown*, 250 F.3d 580, 584 (7th Cir. 2001); *see also* *United States v. Williams*, 216 F.3d 611, 614 (7th Cir. 2000); *United States v. Asher*, 178 F.3d 486, 492 (7th Cir. 1999); *United States v. Zapata*, 871 F.2d 616, 620 (7th Cir. 1989), *abrogated by* *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014) (en banc); *United States v. Shackelford*, 738 F.2d 776, 779 (7th Cir. 1984) (using prongs (1), (2), and (4) even though this is a pre-*Huddleston* case), *abrogated by Gomez*, 763 F.3d 845.

154. *See Brown*, 250 F.3d at 584.

155. LEONARD, *supra* note 60, § 4.7, at 284.

156. *Id.* (citing *United States v. Jones*, 389 F.3d 753, 757 (7th Cir. 2004), *vacated by* 545 U.S. 1125 (2005)).

157. *See Gomez*, 763 F.3d at 855 (“The proponent of the other-act evidence should address its relevance directly, without the straightjacket of an artificial checklist.”); *United States v. Miller*, 673 F.3d 688, 697 (7th Cir. 2012) (“Rule 404(b) requires a case-by-case determination, not a categorical one. The trial judge must balance the relevance of the proposed use of the evidence to the case—and the evidence’s relevance to that proof—against the high risk that the evidence will also tend to establish bad character and propensity to commit the charged crime.”).

158. *See Miller*, 673 F.3d at 698. *See generally* Hinkle, *supra* note 39, at 415–16 (discussing the different circuits’ approaches and tests they applied “when faced with the issue of evidence of a prior conviction for possession to prove a separate instance of possession with intent to sell”); Rinaldo, *supra* note 41, at 150 (describing the federal circuit court applications of rule 404(b)).

159. *Gomez*, 763 F.3d at 855.

160. *See, e.g., Miller*, 673 F.3d at 696–97.

161. *See, e.g., Milich*, *supra* note 36, 780–91; *Reed*, *supra* note 85, at 242–53; David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215, 216–19 (2011).



of prior drug sales or use as relevant to prove states of mind, without differentiating the precise grounds of relevance “as if Rule 404(b) provided a pull-down menu in which one of the menu buttons was ‘select all of the above.’”<sup>162</sup> In the years following *Huddleston*, the cases citing Rule 404(b) seem to reflect an almost automatic admission of other crimes evidence to prove intent in drug cases.<sup>163</sup> According to Professor Reed, it seemed as though to get the evidence in, all the prosecutor needed to do was utter the “magic words” of Rule 404(b) to frame some intermediate issue in the case unless the trial judge believes the probative value was outweighed by its prejudicial effect, waste of time, or confusion of the jury.<sup>164</sup>

Scholars also argue that Rule 404(a), a rule that bars evidence suggesting character propensity, has been degraded as courts and legislatures expand the nine existing exceptions under Rule 404(b) and add new ones that the prosecution can use to its advantage but that make Rule 404(b) too porous to sustain its justification.<sup>165</sup> The cases seem to support the idea that when intent is an issue in the case, this evidence is automatically admitted.<sup>166</sup> In general, case law from the past thirty years of the rule seems to be inconsistent.<sup>167</sup> Professor Milich argued that the rule has been degraded because it has become too far attenuated and is no longer supported by its initial justifications.<sup>168</sup> Further, there are no “clear and workable guidelines for applying the rule.”<sup>169</sup>

Milich discusses several justifications for the rule and explains how each has lost its persuasive value.<sup>170</sup> One of these justifications is to prevent surprising the adverse party at trial.<sup>171</sup> However, surprise has already been diffused by rules adopted by most courts that require “notice of the specific other crimes or acts of the accused that the prosecution intends to offer.”<sup>172</sup> According to Milich, overvaluation is one of the weakest justifications, however, it has gained the most prominence in shaping the modern rule.<sup>173</sup> The overvaluation argument suggests that once the jury learns that the accused has a criminal

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162. Reed, *supra* note 85, at 227.

163. *Miller*, 673 F.3d at 698 (acknowledging this fact in the Seventh Circuit).

164. Reed, *supra* note 85, at 250–51.

165. See, e.g., Milich, *supra* note 36, at 776.

166. See *Miller*, 673 F.3d at 698.

167. Reed, *supra* note 85, at 215.

168. Milich, *supra* note 36, at 790.

169. See *id.*

170. *Id.* at 781–91.

171. *Id.* at 781.

172. *Id.*

173. *Id.* at 781–82.

past, they may overvalue this information and chances of conviction will increase.<sup>174</sup> However, it is difficult to quantify exactly how much jurors will overvalue the information, and many social science studies offered conflicting conclusions on the matter.<sup>175</sup> The justification that the rule bars character propensity is undermined by the inherent propensity inferences one must make when evidence is admitted to prove a state of mind, such as motive or intent.<sup>176</sup> Additionally, the rule may be difficult to apply because the exceptions are fact specific to each case and require a different analysis.<sup>177</sup> Further, the rule requires a heavy reliance on a limiting instruction, which often serves to cause more confusion than direction.<sup>178</sup>

### E. Rationales for the Exclusion of Other Crimes Evidence

A core principle of Anglo-American law is that a person “should not be judged strenuously by reference to the awesome spectre of his past life.”<sup>179</sup> A defendant is not on trial for who she is or what she has the propensity to do but, rather, for what she did.<sup>180</sup> The problem is not that evidence of other crimes is irrelevant, the problem is that the jury may overvalue what that type of evidence is being offered to show.<sup>181</sup> The U.S. Supreme Court embraced this view in *Michelson v. United States*.<sup>182</sup> The Court explained that the evidence “is not rejected because [it] is irrelevant”; it is rejected because it may “weigh too much with the jury[,]” and, in effect, will “overpersuade them . . . to prejudge [the defendant] and deny [her]” of a fair trial in defense of a particular charge.<sup>183</sup> The Court emphasized that the policy of excluding this evidence is supported by the practical experience that the

174. Milich, *supra* note 36, at 782.

175. *Id.* at 783.

176. *Id.* at 786.

177. *Id.* at 788.

178. *Id.* at 789.

179. LEONARD, *supra* note 60, §1.2, at 2 (quoting M.C. Slough & J. William Knightly, *Other Vices, Other Crimes*, 41 IOWA L. REV. 325, 325 (1956)).

180. *See id.*

181. *Id.* § 1.2, at 5–6 (citing 1 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 194, at 415 (3d ed. 1940)). According to John H. Wigmore, evidence of other acts is excluded because it has too, rather than too little, much probative value. *Id.* § 1.2, at 6–7 (“The natural and inevitable tendency of the tribunal . . . is to give excessive weight to the vicious record of crime . . . and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge.” (quoting 1 WIGMORE, *supra* note 181, § 194, at 646)).

182. 335 U.S. 469, 475–76 (1948).

183. *Id.*

exclusion will prevent confusing the issues and reduce any unfair surprise and substantial undue prejudice.<sup>184</sup>

As stated *supra*, a defendant is not on trial for who she is but for what she has done.<sup>185</sup> So, why then would the government want to introduce evidence of prior crimes? John H. Wigmore, a well-known evidence scholar, suggests that the rationale behind the introduction of this evidence is based on the doctrine of chances,<sup>186</sup> “the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all.”<sup>187</sup> In other words, the likelihood that the defendant acted innocently is diminished by the fact that she was not innocent in the past.<sup>188</sup> Such a powerful tool for the prosecution does not come for free as shown through the court’s development of the application of this rule.<sup>189</sup>

In *Old Chief v. United States*,<sup>190</sup> the U.S. Supreme Court articulated: “The term ‘unfair prejudice,’ as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to *lure* the factfinder into declaring guilt on a ground different from proof specific to the offense charged.”<sup>191</sup> The main concern with using other crimes evidence is that the jury will overvalue or confuse the purposes for which the evidence is being offered and, instead, conclude that the defendant acted in conformity with her previous conduct and committed the alleged crime.<sup>192</sup> This is the rationale behind the overvaluation theory, which suggests that the jury will instead convict the defendant for his past actions instead of the crimes currently being charged.<sup>193</sup> This is because the evidence may prejudice the jury by invoking the jury’s punitive instincts.<sup>194</sup> Although this theory permeates case

184. *Id.* at 476.

185. See *supra* notes 179–80 and accompanying text.

186. 1 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 302, at 611 (2d ed. 1923).

187. *Id.*

188. *Id.*

189. See *supra* notes 125–57 and accompanying text (discussing *Huddleston*).

190. 519 U.S. 172 (1997).

191. *Id.* at 180 (emphasis added).

192. Milich, *supra* note 36, at 782.

193. *Id.* at 781–82.

194. Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 584–85 (1985). “[E]xclusionary rules [of evidence] were established to balance the sometimes conflicting goals of truth and fairness by keeping from the jury evidence which would provoke an emotional, rather than rational, decision. Of equal significance to emotional prejudice, however, is the historical concern with evidence which might mislead, rather than enlighten, the jury.” *Id.* at 583 n.17 (citation omitted).

law<sup>195</sup> and other scholarly work,<sup>196</sup> some scholars are critical of the argument's strength.<sup>197</sup> Professor Paul S. Milich is particularly critical of this theory, arguing there is a lack of consistent social science research supporting it<sup>198</sup> and that the forbidden propensity inference is not the true problem in the overvaluation theory.<sup>199</sup>

During trial, there is a concern that character evidence will overcomplicate the issues and confuse the jury.<sup>200</sup> Rule 403 requires the court to conduct a balancing test to determine whether the probative value of the evidence is substantially outweighed by the risk of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."<sup>201</sup> Probative value is a concept that connects the evidence to the historical fact the proponent is trying to establish.<sup>202</sup> Therefore, a proper Rule 403 balancing test embraces accuracy as a means for admissibility.<sup>203</sup> The rule's importance and significance is illustrated, as discussed *supra*, through the court's long, imperfect struggle to attain a suitable analysis.<sup>204</sup>

The nature of other crimes evidence, and Rule 404(a) character trait evidence for that matter, can be troubling to U.S. culture because it has long held a prohibition on "speaking ill of others."<sup>205</sup> Thus, Rule 404 encourages the practice of using caution when making a judgment on someone based on this evidence.<sup>206</sup> Most importantly, the rule supports the concept of fundamental fairness, which the U.S. adversarial court process is founded on.<sup>207</sup> As such, in criminal trials, the highest standard of proof is "bottomed on a fundamental value deter-

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195. See, e.g., *Old Chief*, 519 U.S. at 181; *Huddleston v. United States*, 485 U.S. 681, 691 (1988).

196. See, e.g., LEONARD, *supra* note 60, § 1.2; Milich, *supra* note 36, at *passim*.

197. Milich, *supra* note 36, at 781.

198. Milich argued that "the precise amount by which jurors allegedly overvalue character evidence is unknown, which makes it impossible to gauge whether such overvaluation is worse, from an epistemic standpoint, than denying the jury of whatever 'proper' probative value character evidence has." *Id.* at 783.

199. "The overvaluation argument leans heavily on the propensity inference as the source of the problem and thus uses the propensity inference as a proxy for what is bad about character evidence." *Id.* at 785.

200. LEONARD, *supra* note 60, § 1.2, at 9.

201. FED. R. EVID. 403.

202. Weissenberger, *supra* note 194, at 584.

203. *Id.* at 585. "Distraction is always a function of probative value; that which is distracting can only be so labeled after it is determined that its probative value is low." *Id.* at 584.

204. See *supra* notes 60–178, and accompanying text.

205. LEONARD, *supra* note 60, § 1.2, at 9.

206. *Id.*

207. Weissenberger, *supra* note 194, at 588, 609. "The most that can and should be offered to litigants is a fair trial." *Id.* at 583.

mination of our society that it is far worse to convict an innocent man than to let a guilty man go free.”<sup>208</sup>

### III. ANALYSIS

Rule 404(b) is the most challenged Rule of Evidence on appeal, which demonstrates the rule’s complexity and inconsistent application.<sup>209</sup> The heavy criticism of this rule finally reached the Seventh Circuit in *Miller* and *Gomez*, two cases in which the court changed the existing law by creating a rules-based framework for the admissibility of other crimes evidence under Rule 404(b), which differs from the former checklist test. The rules-based approach is more appropriate because the former checklist test tended to support a mere automatic admission of other crimes evidence. The new test refocuses the issue on relevancy by conflating Rules 402 and 403 with the requirement that the proponent articulate a relevant purpose for the evidence. Although the new test ignores the sole purpose standard derived from *Huddleston*, the rules-based approach nonetheless reflects the concerns and protections presented in *Huddleston*. Thus, just as the Third Circuit has already done, all of the federal circuit courts of appeals should adopt this test to promote uniformity and efficiency in deterring propensity evidence. Additionally, this rules-based approach should be modified to begin with the “sole purpose” standard to better ensure fundamental fairness. This Part provides an analysis of the Seventh Circuit’s opinions in *Miller* and *Gomez*,<sup>210</sup> which includes the realization that the previous test was no longer useful,<sup>211</sup> and argues that the new analysis is still in line with *Huddleston*.<sup>212</sup>

#### A. *The Seventh Circuit Changes the Law: Miller and Gomez*

Prosecutors were quick to catch on to the mere automatic admission of 404(b) evidence. Although there is no specific reason but perhaps because the government abused the admission of this evidence, the Seventh Circuit decided to change the test for admissibility. In 2012, the Seventh Circuit changed the existing law, decided *Miller*,

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208. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring).

209. Hinkle, *supra* note 39, at 405.

210. See *infra* notes 213–40 and accompanying text (analyzing the opinions of *Miller* and *Gomez* and arguing this new approach employed by the Seventh Circuit changed the existing law).

211. See *infra* notes 241–47 and accompanying text (arguing that the previous test used has become no longer useful).

212. See *infra* notes 248–71 and accompanying text (clarifying that this new approach is still within the broader holding of *Huddleston* despite the omission of the “sole purpose” standard).

and abandoned the traditional four-part checklist test used in the past.<sup>213</sup>

The defendant in *Miller* appealed his three convictions: (1) possession of more than five grams of crack cocaine with intent to distribute; (2) possession of a firearm in furtherance of a drug crime; and (3) possession of a firearm by a convicted felon.<sup>214</sup> As a defense, Miller claimed that the drugs were not his.<sup>215</sup> To establish Miller's intent at trial, the prosecution offered evidence under Rule 404(b) that Miller had a previous felony conviction in 2000 for possession of cocaine with intent to distribute.<sup>216</sup> Miller argued that the district court abused its discretion by admitting the details of this prior conviction into evidence.<sup>217</sup> Ultimately the Seventh Circuit agreed, but it first dove into a different analysis of Rule 404(b) evidence.<sup>218</sup>

The court repeated its warning regarding the dangers of too loosely admitting other crimes evidence under the exceptions in Rule 404(b).<sup>219</sup> The court recognized that the arguments presented in the case suggested that admittance of prior drug crimes to prove intent to commit the present drug crimes has become too routine.<sup>220</sup> In its analysis, the court refrained from using the four-part checklist test previously outlined by the Seventh Circuit. Instead, the court rejected it and created a new rule, stating: "In every Rule 404(b) case relying on intent, the court (1) must consider the probative value of the prior act to prove present intent, and (2) must weigh that value against the tendency of the evidence to suggest unfairly a propensity to commit similar bad acts."<sup>221</sup> The court further noted: "Confusion and misuse of Rule 404(b) can be avoided by asking the prosecution exactly how the proffered evidence should work in the mind of a juror to establish

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213. *United States v. Miller*, 673 F.3d 688, 699 (7th Cir. 2012).

214. *Id.* at 692.

215. *Id.* at 696.

216. *Id.* at 692.

217. *Id.*

218. *Id.* at 701.

219. Use of a prior drug distribution conviction to prove intent to distribute is often a disguised use for impermissible propensity purposes, and was so here. We have often warned about the dangers of applying the exceptions in Federal Rule of Evidence 404(b) too loosely to admit prior bad acts, especially in drug cases, without paying close attention to both the legitimacy of the purpose for which the evidence is to be used and the need for it.

*Miller*, 673 F.3d at 692.

220. *Id.* at 697.

221. *Id.* at 699 ("The availability of precedent that balances the relevance of bad acts evidence and decides to admit it does not excuse prosecutors or courts from asking in each new case whether and how prior bad acts evidence might be relevant, probative, and fair.").

the fact the government claims to be trying to prove.”<sup>222</sup> The proponent of the evidence must, therefore, prove a propensity-free line of reasoning for admitting this evidence.<sup>223</sup> Thus, this requirement avoids the forbidden propensity inference: “He intended to do it before, ladies and gentlemen, so he must have intended to do it again.”<sup>224</sup>

Here, the court abandoned the four-part checklist test and, instead, conflated the relevance requirements of Rule 402<sup>225</sup> with the balancing test of Rule 403.<sup>226</sup> Additionally, the court required the proponent to provide a propensity-free line of reasoning to admit the evidence.<sup>227</sup> This new trend in the law further limits the admissibility of propensity evidence.<sup>228</sup> The new rules-based approach refocuses

222. *Id.*

223. *Id.* at 700 (“A prosecutor who wants to use prior bad acts evidence . . . must come to court prepared with a specific reason, other than propensity, why the evidence will be probative of a disputed issue that is permissible under Rule 404(b). Mere recitation that a permissible Rule 404(b) purpose is ‘at issue’ does not suffice.”).

224. *Id.* at 699. To be clear, however, this does not suggest that the evidence should be excluded if there is any propensity inference at all. Instead, “Rule 404(b) excludes the evidence if its relevance to ‘another purpose’ is established *only* through the forbidden propensity inference.” *United States v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014) (en banc). Notably the new framework does not reflect *Huddleston’s* sole purpose test.

225. Rule 402 deals with relevance of evidence and states:

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

FED. R. EVID. 402. This rule should be read in conjunction with Rule 401 which defines relevant evidence as that which is both probative (having “any tendency to make a fact more or less probable than it would be without the evidence”) and material (“the fact must be of consequence in determining the action”). *Id.* at 401. “Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case.” *Id.* at 401 advisory committee’s note.

226. *United States v. Miller*, 673 F.3d 688 (7th Cir. 2012). *See generally* FED. R. EVID. 403.

227. *Miller*, 673 F.3d at 700.

228. The court clearly recognizes the sense of “automatic admission” of this type of evidence in recent drug cases. *Id.* at 696, 698. The new test hopes to preclude propensity evidence, but is that what recent additions to the Federal Rules of Evidence suggest that Congress intends? For example: “In 1994, Congress passed Rules 413, 414, and 415, which permit prosecutors to admit [evidence of] an accused’s past sexual criminal history when charging [her] with sexual misconduct in criminal and civil cases.” *Reed*, *supra* note 85, at 251. There is no balancing test required for this evidence, it automatically comes in. *See* FED. R. EVID. 413(a), 414(a), 415(a). These rules permit the jury to make a propensity inference in sexual misconduct cases, in fact that is the essential purpose. *Id.* Although those rules specifically relate to sexual misconduct, here, it is interesting that the court seems to be trending on curtailing the admission of propensity evidence.

the issue of admissibility on the relevance of the evidence as opposed to requiring the evidence to simply pass a checklist for admission.

After *Miller* introduced this new trend, *Gomez* confirmed it.<sup>229</sup> Decided in 2014, *Gomez*, like *Miller*, addressed similar issues surrounding the admissibility of prior drug convictions in a possession with intent to distribute charge.<sup>230</sup> In *Gomez*, the court expressly abandoned the four-part test, noting: “Our four-part test for evaluating the admissibility of other-act evidence has ceased to be useful. We now abandon it in favor of a more straightforward rules-based approach. This change . . . we hope will produce clarity and better practice in applying the relevant rules of evidence.”<sup>231</sup> The Court stated that “the proponent of the evidence must first establish that the other act is relevant to a specific purpose other than the person’s character or propensity to behave in a certain way.”<sup>232</sup> It is not necessary to exclude other act evidence whenever a propensity inference can be drawn.<sup>233</sup> However, “its relevance to ‘another purpose’ must be established through a chain of reasoning that does not rely on the forbidden inference that the person has a certain character and acted in accordance with that character on the occasion charged in the case.”<sup>234</sup> Then, if the proponent makes this showing, the trial judge must, in every case, conduct a 403 balancing test to determine whether the probative value of the evidence substantially outweighs the potential for any unfair prejudice.<sup>235</sup> This Rule 403 “balancing should take account of the extent to which the non-propensity fact for which the evidence is offered actually is at issue in the case.”<sup>236</sup>

This new test refocuses the issue on whether the evidence has a relevant purpose by conflating the Rule 402 relevancy requirements with the Rule 403 balancing test and, additionally, requiring that the pro-

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229. *Gomez*, 763 F.3d at 864.

230. *Id.* at 850.

231. *Id.* at 853.

Multipart tests are commonplace in our law and can be useful, but sometimes they stray or distract from the legal principles they are designed to implement; over time misapplication of the law can creep in. . . . Especially in drug cases like this one, other-act evidence is too often admitted almost automatically, without consideration of the “legitimacy of the purpose for which the evidence is to be used and the need for it.”

*Id.* (quoting *Miller*, 673 F.3d at 692).

232. *Id.* at 860.

233. *Id.*

234. *Id.*

235. *Gomez*, 763 F.3d at 860.

236. *Id.* Given the length of the holding, it is ironic that the Court wanted to “clarify” the rule. To simplify further, the new test can be boiled down to a “three-P” standard, whether (1) the evidence is proper; (2) prejudice outweighs probative value; and (3) there is a propensity-free theory of admission.



ponent provide a propensity-free line of reasoning.<sup>237</sup> The new test is based on the Federal Rules of Evidence, hence the name “rules-based approach.”<sup>238</sup> Since *Gomez*, the Seventh Circuit has followed this new test in several other cases containing Rule 404(b) issues, citing to *Gomez* as abandoning the old, and establishing the new, test.<sup>239</sup>

Moreover, the new rules-based approach developed in *Gomez* has been adopted by the Third Circuit,<sup>240</sup> and the remaining circuits should follow. The previous four-part checklist test used by the Seventh Circuit is no longer useful. Although the new test seems to dance around the U.S. Supreme Court’s sole purpose test stated in *Huddleston*, it is nonetheless consistent with the broader holding of *Huddleston* in that it reflects the view that a rules-based approach will deter the admission of propensity evidence. This is done by refocusing the inquiry on the relevancy of this evidence. The new test reduces the reliance on a limiting instruction to deter a propensity inference. Therefore, the new test should be followed by all of the Circuits.

### *B. A Change for the Better: The Seventh Circuit’s Checklist Test Is No Longer Useful*

If courts want to ensure the fundamental principles of a fair trial, they must adopt the new rules-based framework of the Seventh Circuit and additionally begin their analysis with the “sole purpose” standard. In determining that the four-part test was no longer appropriate, the Seventh Circuit stated that some parts of the old test lacked an adequate basis in the Federal Rules of Evidence and induced an automatic admission of evidence as long as the evidence fits the criteria.<sup>241</sup>

The first step of the old test correlates to a basic admissibility inquiry under Rule 402, that the evidence be admitted for a proper purpose provided in Rule 404(b), such as intent or knowledge.<sup>242</sup> “Step two of the test, which requires an inquiry into the similarity and timing of the other act, is loosely connected to the basic principles of rele-

237. *Id.*

238. *Id.* at 853.

239. *See, e.g.*, *United States v. Chapman*, 765 F.3d 720, 725–26 (7th Cir. 2014); *United States v. Schmitt*, 770 F.3d 524, 532–33 (7th Cir. 2014); *United States v. Stacy*, 769 F.3d 969, 973–76 (7th Cir. 2014); *United States v. Vance*, 764 F.3d 667, 671 (7th Cir. 2014) (“As this court explained in [*Gomez*], . . . regarding the first of these requirements, the relevance of the evidence for a proper purpose ‘must be established through a chain of reasoning that does not rely solely on the forbidden [propensity] inference . . . .’”).

240. *See, e.g.*, *United States v. Caldwell*, 760 F.3d 267, 281–83 (3d Cir. 2014).

241. *Gomez*, 763 F.3d, at 853.

242. *Id.*

vance found in Rules 401 and 402.”<sup>243</sup> However, the strength of this inquiry heavily depends on the facts of the case and the particular theory of admissibility.<sup>244</sup> The Seventh Circuit has often stated that this requirement is not “unduly rigid” but, instead, “loosely interpreted and applied.”<sup>245</sup> Having a remote foundation in the Rules of Evidence, the Seventh Circuit concluded that the similarity and timing of the other act may not bear on the relevance question at all, and it is too often treated as a formal checklist.<sup>246</sup> Rather, the Seventh Circuit suggests that “it best to return to a framework that weighs the relevance of other-act evidence directly.”<sup>247</sup> The Seventh Circuit changed the law by replacing the former checklist test with a rules-based framework, which refocuses the issue for admissibility on relevancy.

### C. Rules-Based Approach Relation to *Huddleston*

Although the new test ignores the “sole purpose” standard derived from *Huddleston* by not including it in the analysis, this test nonetheless reflects the concerns and protections presented in *Huddleston* by reflecting the view that an approach grounded in the Rules will deter admission of propensity evidence.<sup>248</sup> The new rule refocuses the analysis on the “legitimacy of the purpose for which the evidence is to be used and the need for it.”<sup>249</sup> The rule is easier to apply as it asks three simple questions (is it proper, probative, and propensity-free?)<sup>250</sup> instead of conducting a four-part inquiry that may not even be relevant (e.g., the timing of the prior act).<sup>251</sup>

The U.S. Supreme Court’s holding in *Huddleston* reflected the general intent of the framers of the Federal Rules of Evidence—that the rule be inclusionary.<sup>252</sup> However, in actual practice, courts have used the rule as if it were “a categorical exclusionary rule followed by a limited number of judicially-recognized exceptions.”<sup>253</sup> Professor Reed argues that federal courts often pay lip service to the idea that it

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243. *Id.* at 854.

244. *Id.* (“In some cases the relative similarity of the other act to the charged offense may be unimportant as a test of relevance.”).

245. *Id.* (quoting *United States v. Foster*, 652 F.3d 776, 785 (7th Cir. 2011) and *United States v. Vargas*, 552 F.3d 550, 555 (7th Cir. 2008)).

246. *Id.*

247. *Gomez*, 763 F.3d at 854–55.

248. *Id.* at 853–54.

249. *Id.* at 853 (quoting *United States v. Miller*, 673 F.3d 688, 692 (7th Cir. 2012)).

250. *Huddleston v. United States*, 485 U.S. 681, 684 (1988).

251. *See Gomez*, 763 F.3d at 854.

252. *Huddleston*, 485 U.S. at 688–89.

253. Reed, *supra* note 85, at 243.

is an inclusionary rule and instead apply it as exclusionary.<sup>254</sup> In *Gomez*, the Seventh Circuit addresses this issue in a footnote;<sup>255</sup> however, arguably, this discussion classifying the rule as inclusionary should have received more attention in the opinion because it is a matter of extreme importance.

The Seventh Circuit reiterates and reaffirms the intent of the rule as reflected by the framers and in *Huddleston*.<sup>256</sup> The first inquiry in the *Gomez* test requires the evidence be proper, in that it must be relevant to a specific purpose other than propensity.<sup>257</sup> This requirement directly reflects the first and second steps in the *Huddleston* framework.<sup>258</sup> Evidence is proper under Rule 404(b) as long as it does not suggest a propensity inference, thus, reflecting an inclusionary form of the rule intended by the framers and *Huddleston*.<sup>259</sup> The second step of the test, that the probative value of the evidence is not substantially outweighed by its unfair prejudice, is again in accordance with the third part of the *Huddleston* framework requiring a Rule 403 balance.<sup>260</sup> Thus, the new test bolsters part three of the *Huddleston* framework because it requires the proponent to provide a propensity-free line of reasoning, making the probative value weigh heavier than the prejudicial effect at the outset of the Rule 403 balancing test.<sup>261</sup> This is important for two reasons.

First, it is nearly impossible to prove intent by using a prior conviction for the same offense without inherently suggesting a propensity inference.<sup>262</sup> Trying to infer intent in the present case using a prior act in a different situation is “highly questionable as a matter of both human personality analysis and simple logic.”<sup>263</sup> Even if a limiting

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254. *Id.*; see *People v. Molineux*, 61 N.E. 286 (N.Y. 1901) (fashioning a rule that took the exclusionary form with a limited number of exceptions for admission of this evidence); *supra* notes 98–103 and accompanying text (discussing *Molineux*).

255. *Gomez*, 763 F.3d at 855 n.3. The court clarified that Rule 404(b) is often misunderstood as a rule of exclusion subject to certain exceptions, which is not at all accurate. *Id.* Read carefully, the rule does not specifically say that propensity evidence is inadmissible *except* when used to prove motive, opportunity, intent, etc., instead, the rule says that such evidence is *categorically* inadmissible. *Id.* (citing FED. R. EVID. 404(b)(1)).

256. *Id.* at 853–54 (discussing the *Huddleston* case).

257. *Id.* at 860.

258. See *Huddleston*, 485 U.S. at 691–92.

259. See *id.* at 691 (using a four-part test, in the first part stating, “the evidence be offered for a proper purpose”); *Gomez*, 763 F.3d at 855 n.3.

260. See *Huddleston*, 485 U.S. at 691 (stating, as to the third part of the test, “from the assessment the trial court must make under Rule 403 to determine whether the probative value of the similar acts evidence is substantially outweighed by its potential for unfair prejudice”); *Gomez*, 763 F.3d at 860.

261. See *Huddleston*, 485 U.S. at 691; *Gomez*, 763 F.3d at 860.

262. Sonenshein, *supra* note 161, at 217.

263. *Id.*

instruction (which will be discussed in detail *infra*) is given, offers of this kind of evidence present the greatest prejudice because it makes for the inevitable propensity inference.<sup>264</sup> Professor David Sonenshein summarized: “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?”<sup>265</sup> Consequently, “[t]here is no propensity-free chain.”<sup>266</sup> The new *Gomez* test requires a propensity-free line of reasoning, which disposes of this problem.

Second, the ultimate decision to admit the evidence lies within the Rule 403 balancing test, which requires a subjective evaluation of the judge.<sup>267</sup> By providing the judge with a propensity-free line of reasoning for admitting this evidence, the judge’s discretionary evaluation becomes a lot easier.<sup>268</sup> A record will have been created for which the judge cannot easily deviate from, and therefore it becomes more difficult for the judge to have abused his discretion.<sup>269</sup> Thus, the new test does not overburden the trial judge’s discretion.

The Seventh Circuit’s new rules-based approach of Rule 404(b) evidence reflects the broader relevancy concern of *Huddleston*, and the importance of a rules-grounded approach.<sup>270</sup> The rules-based approach refocuses on the issue of *how* the evidence is admissible instead of *whether* it is admissible.<sup>271</sup> It is another reminder of the concept of fundamental fairness supporting our adversarial system. Specifically, the defendant is not on trial for who she is but, rather, for the crime charged. Therefore, uniform adoption of this approach should be implemented.

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264. *Id.* This Comment discusses the issue of intent. This is not to suggest that all prior crimes have an inherent propensity inference. “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.” *Id.* On the other hand, in a murder case, offering evidence of an earlier unrelated murder committed by the defendant, to show “intent” in the case at bar is “logically and scientifically irrelevant to show such intent.” *Id.* at 218.

265. *Id.* (alteration in original).

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

267. Reed, *supra* note 85, at 216.

268. *Id.* at 214.

269. *See id.* at 214–15.

270. *See supra* notes 125–46 and accompanying text (detailing the U.S. Supreme Court’s holding in *Huddleston*).

271. *United States v. Gomez*, 763 F.3d 845, 856 (7th Cir. 2014) (en banc).

### D. Circuit Uniformity

The new test should be adopted as a standard test by the rest of the federal circuit courts of appeals as uniformity among the circuits ensures compliance and fairness. Currently, only the Third Circuit has adopted the rules-based approach identified in *Miller*.<sup>272</sup>

The Second and Tenth Circuits still follow the four-part *Huddleston* framework.<sup>273</sup> Although the D.C. Circuit does not expressly state a test for admissibility, the cases cite to *Huddleston*.<sup>274</sup> The Fourth Circuit follows a four-part test that is slightly different from *Huddleston*.<sup>275</sup> The Fourth Circuit requires: (1) that the evidence “be relevant to an issue” (the more similar the prior act, the more relevant it becomes); (2) that the evidence is “necessary in the sense that it is probative of an essential claim or an element of the offense”; (3) the prior act be reliable; and (4) a determination as to whether the probative value of the evidence is substantially outweighed by unfair prejudice.<sup>276</sup> The requirements of timeliness and reliability are similar to the test previously applied by the Seventh Circuit.<sup>277</sup>

The Eighth and Ninth Circuits apply similar tests that also resemble the four-part test previously applied by the Seventh Circuit.<sup>278</sup> Those circuits require that the evidence:

“(1) proves a material element of the offense for which the defendant is now charged, (2) if admitted to prove intent, is similar to the offense charged, (3) is based on sufficient evidence, and (4) is not too remote in time.”<sup>279</sup> The only difference between these two circuits is that the Eighth Circuit does not have the explicit language, “if admitted to prove intent,” in step two of its test.<sup>280</sup>

The First and Fifth Circuits apply a simple two-step inquiry.<sup>281</sup> The court must ask: “(1) ‘whether the extrinsic offense evidence is relevant to an issue other than the defendant’s character’; and (2) whether the

272. See, e.g., *United States v. Caldwell*, 760 F.3d 267, 281–83 (3d Cir. 2014) (citing *United States v. Miller*, 673 F.3d 688 (7th Cir. 2012)).

273. See, e.g., *United States v. Smalls*, 752 F.3d 1227, 1237 (10th Cir. 2014); *United States v. Scott*, 677 F.3d 72, 79 (2d Cir. 2012).

274. See, e.g., *United States v. Brown*, 597 F.3d 399, 404 (D.C. Cir. 2010).

275. See, e.g., *United States v. McLaurin*, 764 F.3d 372, 380 (4th Cir. 2014).

276. *Id.* at 380 (quoting *United States v. Queen*, 132 F.3d 991, 997 (4th Cir. 1997)).

277. See generally *United States v. Brown*, 250 F.3d 589, 584 (7th Cir. 2001) (requiring evidence to be “sufficiently similar and close in time”).

278. See, e.g., *United States v. Battle*, 774 F.3d 504, 513 (8th Cir. 2014); *United States v. Hardrick*, 766 F.3d 1051, 1055 (9th Cir. 2014).

279. *Hardrick*, 766 F.3d at 1055 (quoting *United States v. Ramirez-Robles*, 386 F.3d 1234, 1242 (9th Cir. 2004)).

280. See *Battle*, 744 F.3d at 513.

281. See, e.g., *United States v. Ledée*, 772 F.3d 21, 36 (1st Cir. 2014); *United States v. Wallace*, 759 F.3d 486, 493 (5th Cir. 2014).

probative value of the evidence is substantially outweighed by undue prejudice.”<sup>282</sup>

The Sixth Circuit applies a three-step test unlike any of the other circuits.<sup>283</sup> The court must first determine that the act offered under 404(b) actually occurred, then decide whether the evidence is probative of a material issue other than character, and, lastly, conduct a 403 balancing test.<sup>284</sup>

Finally, the Eleventh Circuit also applies a dissimilar three-step test.<sup>285</sup> In this circuit, a court must determine that: (1) “the evidence must be relevant to an issue other than the defendant’s character”<sup>286</sup>; (2) “the act must be established by sufficient proof to permit a jury finding that the defendant committed the extrinsic act”;<sup>287</sup> and (3) “the probative value of the evidence must not be substantially outweighed by its undue prejudice.”<sup>288</sup>

As discussed *supra*, there is no uniform test applied by every circuit. However, all of the circuits seem to embrace the requirement that the evidence be relevant for a proper purpose under Rule 404(b) and that the evidence’s probative value must not be substantially outweighed by unfair prejudice.<sup>289</sup> Again, all the *Gomez* test adds to these common requirements is a propensity-free reasoning for admitting the evidence.<sup>290</sup> Therefore, in the interest of promoting uniformity throughout the Federal Circuit Courts of Appeals, the new test in *Gomez* (created by the Seventh Circuit and adopted by the Third Circuit) should be applied by all the remaining circuit courts. The new test does not differ from what the courts already use. In fact, the new test substantially summarizes the concerns the other courts seem to imply—that the evidence is proper, lacks propensity, and is probative.

In addition, the rules-based framework should be modified to begin with the sole purpose standard derived from *Huddleston*. From the discussion *supra*, it seems as if the courts ignore the sole purpose test in exchange for a multipart test.<sup>291</sup> The sole purpose test prohibits the introduction of extrinsic act evidence when the *sole purpose* of intro-

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282. *Wallace*, 759 F.3d at 493 (quoting *United States v. Mitchell*, 484 F.3d 762, 774 (5th Cir. 2007)).

283. *See, e.g.*, *United States v. Mack*, 729 F.3d 594, 601 (6th Cir. 2013).

284. *Id.* (citations omitted).

285. *See, e.g.*, *United States v. Holt*, 777 F.3d 1234, at 1266 (11th Cir. 2015).

286. *United States v. McNair*, 605 F.3d 1152, 1203 (11th Cir. 2010) (quoting *United States v. Mathews*, 431 F.3d 1296, 1310–11 (11th Cir. 2005)).

287. *Id.*

288. *Id.*

289. *See supra* notes 273–88 and accompanying text.

290. *See United States v. Gomez*, 763 F.3d 845, 852 (7th Cir. 2014) (en banc).

291. *See supra* notes 209–40 and accompanying text.

ducing that evidence is to prove character propensity.<sup>292</sup> Including this important standard at the start of the rules-based approach ensures accordance with the U.S. Supreme Court's opinion in *Huddleston*. It also simplifies the standard because if the sole purpose is none other than propensity, then the evidence is inadmissible and no further inquiry is needed. Therefore, all circuits should adopt the rules-based framework which should begin with the sole purpose standard in accordance with *Huddleston*. Adoption of this approach will ensure fundamental fairness in our trial system and will prevent the misapplication of one of the most useful rules of evidence. Although the new approach may be difficult, it is a necessary adjustment.

#### IV. IMPACT

Adoption of this new approach will further the principles of fundamental fairness in trial procedure. This Section: (1) discusses the impact this new approach will have on trial practice and provides an examples of the successful admission of this evidence under *Gomez*;<sup>293</sup> (2) discusses how the new approach will reduce the reliance on limiting instructions;<sup>294</sup> and (3) suggests that by refocusing the issue on relevancy, the mere automatic admission effect is closed.<sup>295</sup>

##### A. *Difficult but Not Impossible*

Judge Easterbrook was quite correct in stating: "Prosecutors who do not understand and apply the full scope of the *Gomez* decision will find their convictions hard to sustain on appeal."<sup>296</sup> Undoubtedly, federal prosecutors did not greet the new test advanced in *Gomez* with wide-open arms. As the new test requires a propensity-free chain of reasoning, the job of a federal prosecutor has become substantially more difficult to admit other crimes evidence to prove intent.<sup>297</sup> For example, prosecutors must have to articulate why evidence of a prior conviction for possession with intent to distribute

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292. *Huddleston v. United States*, 485 U.S. 681, 687 (1988).

293. See *infra* notes 296–314 and accompanying text (providing examples of several cases in which the court conducted the new rules-based approach analysis and ultimately admitted the evidence).

294. See *infra* notes 315–49 and accompanying text (explaining the effectiveness of limiting instructions at trial and how the new approach will reduce this reliance).

295. See *infra* notes 350–54 and accompanying text (discussing the automatic admission approach and how this new approach will put an end to this effect).

296. *United States v. Lawson*, 776 F.3d 519 (7th Cir. 2015).

297. See *United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014) (en banc).

is probative of the defendant's intent on her current charge for the same crime—an inference that inherently reeks of propensity.<sup>298</sup>

The Seventh Circuit has applied the new test of *Gomez* six other times in 2014.<sup>299</sup> Other crimes evidence was admissible in three out of six cases.<sup>300</sup> The court found that it was an error for the trial judge to admit the evidence twice,<sup>301</sup> and, in one case, the defense did not preserve error on the record for appeal.<sup>302</sup>

The new test makes admission of other crimes evidence difficult but not impossible. For example, in *United States v. Curtis*,<sup>303</sup> the prosecution successfully admitted other crimes evidence under Rule 404(b), and the conviction was affirmed on appeal.<sup>304</sup> The defendant in *Curtis* was found guilty of three misdemeanor counts of failure to pay income taxes.<sup>305</sup> Notably, for more than fifty years, the defendant had been a lawyer, running a successful sole proprietorship during his appeal.<sup>306</sup> The defendant filed taxes for the years 2007 through 2009, and he owed a substantial amount of \$151,906, \$113,354, and \$112,973, respectively.<sup>307</sup> However, the defendant failed to pay his tax liability.<sup>308</sup> An element of the charge was that the defendant “acted willfully in failing to pay[.]” which the defendant contested at trial.<sup>309</sup> To satisfy this element, the prosecution sought to admit evidence under Rule 404(b) that the defendant had failed to pay his payroll taxes for his employees during the same time period for which he was now on trial.<sup>310</sup>

Citing *Gomez*, the Seventh Circuit held that the evidence was admissible because neither of the government's two reasons offered in support of admitting the payroll tax evidence relied on the forbidden

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298. See generally Hinkle, *supra* note 39, 413–14 (discussing how a judge should apply the test); Rinaldo, *supra* note 41, at 151 (discussing similar facts in *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993)).

299. See *Lawson*, 776 F.3d at 519; *United States v. Chapman*, 765 F.3d 720, 725–26 (7th Cir. 2014); *United States v. Clark*, 754 F.3d 401, 409–10 (7th Cir. 2014) (providing no reference to *Gomez* or Rule 404 in the opinion, but applying the test); *United States v. Schmitt*, 770 F.3d 524, 532–33 (7th Cir. 2014); *United States v. Stacy*, 769 F.3d 969, 973–74 (7th Cir. 2014); *United States v. Vance*, 764 F.3d 667, 672 (7th Cir. 2014).

300. See *Clark*, 754 F.3d at 410; *Schmitt*, 770 F.3d at 540; *Vance*, 764 F.3d at 671.

301. See *Chapman*, 765 F.3d at 727; *Stacy*, 769 F.3d at 974.

302. See *Lawson*, 776 F.3d at 522.

303. 781 F.3d 904 (7th Cir. 2015).

304. *Id.* at 911–12.

305. *Id.* at 905.

306. *Id.* at 906.

307. *Id.*

308. *Id.*

309. *Curtis*, 781 F.3d at 907.

310. *Id.* at 909.



propensity inference.<sup>311</sup> The court adopted the government's reasoning and concluded that "the evidence was relevant to rebut the implication that [the defendant] had fully paid his recent tax obligations."<sup>312</sup> Additionally, the evidence was also relevant to rebut the defendant's anticipated defense that he acted with a good faith misunderstanding in failing to pay his taxes in the those three years.<sup>313</sup> The government's fully articulated reasoning following *Gomez* did not rely on the forbidden propensity evidence, was ultimately successful, and did not require the reliance on a limiting instruction.<sup>314</sup>

*B. The Rules-Based Framework Reduces the Reliance on the Limiting Instruction*

Part four of the *Huddleston* framework offers that Rule 105 . . . "provides that the trial court shall, upon request, instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted."<sup>315</sup> Pursuant to Rule 105 a judge must issue a limiting instruction when evidence is admitted for a narrow purpose.<sup>316</sup> The judge will define the parameters by which the jury may consider the evidence.<sup>317</sup> By requiring the proponent of the evidence to provide a propensity-free line of reasoning, the reliance on such a limiting instruction to preclude a propensity inference is greatly reduced. In general, judges have long been quite weary of using limiting instructions.<sup>318</sup> Rightfully so because "a large body of research indicates that jurors have great difficulty ignoring information once they have become aware of it."<sup>319</sup> The classic example of the "purple elephant in the room" comes to mind. For example, if a person is told not to imagine a purple elephant in the middle of the room, she immediately imagines just that. The same thing can be said for a limiting instruction; jurors often pay greater attention to evidence when an ad-

311. *Id.* at 910.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Huddleston v. United States*, 485 U.S. 681, 691–92 (1988).

316. FED. R. EVID. 105.

317. *Id.*

318. *See, e.g., Bruton v. United States*, 391 U.S. 123, 129 (1968) (quoting *Krulewitch v. United States*, 336 U.S. 440, 453 (1949)) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know [this] to be unmitigated fiction . . . ." (alterations in original))).

319. *See* 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, 678 (2000).

monition is given than when the judge remains silent on the issue.<sup>320</sup> “With few exceptions, empirical research has repeatedly demonstrated that . . . limiting instructions are unsuccessful at controlling jurors’ cognitive processes.”<sup>321</sup>

A study conducted in 1973 by Professor Doob and his colleague Kirshenbaum offered participants a hypothetical burglary case and informed only one-half of the participants that the defendant had a prior record.<sup>322</sup> Those participants were then given a judicial instruction limiting their consideration of the prior record to determine credibility only, and not as an indicator of guilt.<sup>323</sup> The study showed that “[p]articipants were more likely to rate the defendant as guilty when they were exposed to prior criminal record information than when no record information was given.”<sup>324</sup>

Other studies reached similar results.<sup>325</sup> In 1985, researchers Wissler and Saks conducted a study in which the participants were told one of the following things: (1) that the defendant had previously been convicted of either a similar crime or committed; (2) a dissimilar crime of perjury; or (3) were given no information about a prior record.<sup>326</sup> The participants that were presented with prior record information were given a similar judicial instruction to use the information only to determine the defendant’s credibility, and not as an indication that the defendant had a criminal disposition.<sup>327</sup> Interestingly, the results indicated that the defendant’s credibility ratings were not affected by the prior conviction information.<sup>328</sup> The jurors perceived all defendants as equally credible despite receiving varying information about prior convictions or lack there of.<sup>329</sup> However, it appeared that verdicts were affected by type of prior offense.<sup>330</sup> There were significantly more guilty verdicts for defendants with similar convictions (75%)

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320. *Id.*

321. *Id.* at 686.

322. *Id.* (citing A.N. Doob & H.M. Kirshenbaum, *Some Empirical Evidence on the Effect of S. 12 of the Canada Evidence Act Upon an Accused*, 15 CRIM. L. QUARTERLY 88 (1972)).

323. *Id.*

324. *Id.*

325. *See infra* notes 326–31 and accompanying text (discussing a study conducted by researchers, Wissler and Saks, in addition to explaining the “backfire effect”).

326. Sonenshein, *supra* note 161, at 269 (citing Roselle L. Wissler & Michael J. Saks, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence To Decide on Guilt*, 9 L. & HUM. BEHAV. 37, 40 (1985)).

327. Wissler & Saks, *supra* note 326, at 40.

328. *Id.* at 43.

329. *Id.*

330. *Id.*

than defendants with dissimilar convictions (52.5%), perjury convictions (60%), or no convictions (42.5%).<sup>331</sup>

There are many factors that influence the success of these limiting instructions, such as the backfire effect.<sup>332</sup> The backfire effect occurs when jurors pay greater attention to information after it has been ruled inadmissible than if the judge had said nothing at all about the evidence (i.e., the purple elephant example *supra*).<sup>333</sup> The occurrence of a backfire effect may, in part, depend on the type of evidence that is being offered.<sup>334</sup> However, this effect may not occur when the jurors consider the information unreliable.<sup>335</sup>

Therefore, it is reasonable to argue that the effectiveness of a limiting instruction is highly questionable.<sup>336</sup> The *Huddleston* framework provides that the protection from unfair prejudice of other crimes evidence emanates from the limiting instruction of Rule 105.<sup>337</sup> By requiring a propensity-free line of reasoning for the admission of this evidence, the *Gomez* test forecloses the need for a limiting instruction to provide such protection from unfair prejudice.<sup>338</sup> Arguably, an instruction may still be given, but its effectiveness will be strengthened on the propensity-free line of reasoning.

Although it is true the propensity-free reasoning requirement does not overburden the judge's discretion in making admissibility decisions, judges cannot solely rely on a limiting instruction to prevent a propensity inference. As discussed *supra*, limiting instructions are not completely reliable.<sup>339</sup> Additionally, prior to the *Gomez* decision, courts admitted Rule 404(b) other crimes evidence as long as a limiting instruction was given.<sup>340</sup>

In *United States v. Brooks*,<sup>341</sup> the defendant appealed the admission of a prior drug conviction during his trial for various drug conspiracy

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331. *Id.* at 43 tbl.2.

332. See Sonenshein, *supra* note 161, at 269, 270 & n.357 (citing Rachel K. Cush & Jane Goodman Delahunty, *The Influence of Limiting Instructions on Processing and Judgments of Emotionally Evocative Evidence*, 13 PSYCHIATRY PSYCHOL. & L., 110, 192 (2006) and 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. 677-79 (2000)).

333. *Id.*

334. See *id.* at 268.

335. See *id.*

336. See *id.* at 254.

337. *Huddleston v. United States*, 485 U.S. 681, 691-92 (1988).

338. *United States v. Gomez*, 763 F.3d 845, 860 (7th Cir. 2014) (en banc).

339. See *supra* note 178 and accompanying text.

340. See, e.g., *United States v. Brooks*, 736 F.3d 921, 940-41 (10th Cir. 2013).

341. 736 F.3d 921 (10th Cir. 2013).

charges.<sup>342</sup> The Tenth Circuit analyzed whether: (1) the evidence was offered for a proper purpose; (2) it was relevant; (3) its probative value was outweighed by unfair prejudice; and, finally, (4) a limiting instruction was given.<sup>343</sup> The court found that “[b]ecause the district court gave a limiting instruction and the prior conviction meets the requirements of the Rules 401, 403, and 404(b), the district court did not abuse its discretion in admitting such evidence.”<sup>344</sup> Additionally, the court noted that “absent a showing to the contrary, we ‘presume jurors will conscientiously follow the trial court’s instructions.’”<sup>345</sup> This reliance is clearly misplaced.

Similarly, in *United States v. Hearn*,<sup>346</sup> the Seventh Circuit stated that “limiting instructions ‘are effective in reducing or eliminating any possible unfair prejudice from the introduction of Rule 404(b) evidence.’”<sup>347</sup> The court concluded that the trial judge did not abuse his discretion by admitting 404(b) evidence because a limiting instruction was given.<sup>348</sup> *Brooks* and *Hearn* are perfect examples of how applying a checklist style test induces a mere automatic admission of this evidence.<sup>349</sup> As long as the evidence fits the criteria, it will get in. This is not what the Supreme Court intended in *Huddleston*. The new rules-based approach refocuses the issue on whether the evidence is *relevant*.

C. *By Refocusing on Relevancy, the Mere Automatic Admission Effect Is Foreclosed*

This new change in the law is important because it forecloses the mere automatic admission effect. The prior checklist approach allowed the admission of other crimes evidence under 404(b) as long as it met a checklist, and, in some cases, the evidence was admitted to prove issues that were not necessarily relevant.<sup>350</sup> For example, in *Miller*, the defendant’s defense was that the marijuana was not his.<sup>351</sup> Nonetheless, the prosecution admitted his prior convictions to prove

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342. *Id.* at 926.

343. *Id.* at 939–41.

344. *Id.* at 941.

345. *Id.* (quoting *United States v. Cardinas Garcia*, 596 F.3d 788, 798 (10th Cir. 2010)).

346. 736 F.3d 921 (10th Cir. 2013).

347. *Id.* at 713 (quoting *United States v. Jones*, 389 F.3d 753, 757 (7th Cir. 2004), *vacated*, 545 U.S. 1125 (2005)).

348. *Id.*

349. *United States v. Brooks*, 736 F.3d 921, 940–41 (10th Cir. 2013); *United States v. Hearn*, 534 F.3d 706 (7th Cir. 2008), *on rehearing* 549 F.3d 680.

350. *See, e.g., United States v. Miller*, 673 F.3d 688, 697–700 (7th Cir. 2012).

351. *Id.* at 696.

intent to distribute.<sup>352</sup> If the Seventh Circuit had applied the prior four-part checklist, the court would have found the evidence to be admissible as it satisfied the checklist. Instead, by rejecting the old approach, the Seventh Circuit refocused the issue on relevancy.<sup>353</sup> Here, the issue of intent was not highly probative because the defendant's defense was that the drugs were not his.<sup>354</sup> This new approach puts an end to cases in which 404(b) evidence comes in to prove, for example, intent when the defense has nothing to do with intent as illustrated in *Miller*. Refocusing the issue on relevancy gives a new life to Rule 403 in the 404(b) analysis.

The new test changes the analysis for both the proponent of the evidence and the court. The proponent must articulate a propensity-free reasoning. The court can no longer rationalize that a limiting instruction negates error. This change in the law is important because it furthers the standards of a fair trial, which is why all circuits must adopt this standard and begin the inquiry with the sole purpose standard.

## V. CONCLUSION

The new test advanced by the Seventh Circuit in *Gomez* radically changed the way the courts assess the admissibility of Rule 404(b) other crimes evidence because the court changed the existing law. Although the new test continues to ignore the sole purpose test, the test is still consistent with the broader holding of the U.S. Supreme Court in *Huddleston*, and it better effectuates those concerns.<sup>355</sup> The requirement of providing a propensity-free line of reasoning to admit other crimes evidence reduces the reliance on limiting instructions, which are not inherently reliable in the first place.<sup>356</sup> Therefore, because all federal circuit courts of appeals have differing tests, the remaining circuits should uniformly apply the new test as to ensure fairness and accuracy. In addition, the rules-based framework should be modified to begin with the sole purpose standard derived from

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352. *Id.*

353. *See id.* at 699.

354. *See id.*

355. *See supra* notes 238–71 and accompanying text (explaining that the new test is still within the holding of *Huddleston* as it reflects an approach grounded in the Rules of Evidence).

356. *See supra* notes 315–48 and accompanying text (describing the negative aspects of limiting instructions, including that it causes jurors to focus on the inadmissible evidence).

*Huddleston*.<sup>357</sup> After all, fundamental fairness is at the root of the U.S. legal system.

*Antonia M. Kopeć\**

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357. *See supra* notes 291–92 (discussing the importance of incorporating the sole purpose standard with the rules-based approach at the very beginning).

\* J.D. Candidate, DePaul University College of Law, 2016; B.A., DePaul University, 2013. I would like to sincerely thank the Volume 65 Editorial Board for the honor and opportunity to have this article published. It was such a pleasure to work with you all these past two years. A special thank you to Judge Warren Wolfson for his inspiration and guidance on this topic. Last, but certainly not least, I would especially like to thank and send my love to Rose and Joseph Kopeć, Danielle Marie Pisterzi, and Jack Lonquist for their never ending support and love during the publication process. Thank you for inspiring to be a better version of myself and encouraging me to achieve my goals. Any errors are mine alone.

