THE DEGRADING CHARACTER RULE IN AMERICAN CRIMINAL TRIALS

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I. INTRODUCTION

The American rule barring character evidence in criminal cases is degrading in every sense of the word. The rule's vitality has degraded as courts and legislatures expand existing exceptions and add new ones.[1] The rule's coherence has degraded so badly that the justifications for the rule and the tools for applying it are anemic in all but the clearest cases. Finally, it is degrading for the American criminal trial system to continue to flog this decrepit rule.[2]

Many cases and scholarly articles have detailed the convoluted, contradictory, and absurd aspects and applications of the character rule.[3] In most criminal trial courts across America, the

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[1] *See, e.g.*, PAUL S. MILICH, GEORGIA RULES OF EVIDENCE § 11.13 (2011–2012 ed.). Georgia courts created a huge new exception for prior crimes and bad acts to prove the defendant's "bent of mind" and "course of conduct"—an unprecedented subversion of the character rule that was eliminated by the legislature's adoption of Georgia's new evidence code. McMullen v. State, 730 S.E.2d 151, 158 n.30 (Ga. Ct. App. 2012); *see also* FED. R. EVID. 413–15 (creating an exception for prior sexual misconduct in sex offense cases).

[2] *See* Nicholson v. State, 186 S.E.2d 287, 289 (Ga. Ct. App. 1971) ("If we do not agree [with the character rule's premise] we should question it openly. To circumvent it by slipshod reasoning on a case by case basis results in confusion for the trial courts which must apply the rules.").

[3] *See, e.g.*, Michelson v. United States, 335 U.S. 469, 486 (1948) ("We concur in the general opinion of courts, textwriters and the profession that much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other."); 1A JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 54.1 (Tillers rev. 1983) [hereinafter WIGMORE ON EVIDENCE] (Tillers warns that unless we rethink the character rule, "courts are doomed to continue their often inadvertently hypocritical efforts to make sense out of nonsense"). For other scholarly work on the subject, see generally Edward J. Imwinkelried, *The Use of Evidence of an Accused's Uncharged Misconduct To Prove* Mens Rea*: The Doctrines Which Threaten To Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575 (1990); Richard B. Kuhns, *The Propensity To Misunderstand the Character of Specific Acts Evidence*, 66 IOWA L. REV. 777 (1981); David P. Leonard, *In Defense of the Character Evidence Prohibition: Foundations of the Rule Against Trial by Character*, 73 IND. L.J. 1161 (1998); Miguel A. Méndez, *Character Evidence Reconsidered: "People Do Not Seem To Be Predictable Characters,"* 49 HASTINGS L.J. 871 (1998); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181 (1998); Abraham P. Ordover, *Balancing the Presumptions of Guilt and Innocence: Rules 404(b), 608(b) and 609(a)*, 38 EMORY L.J. 135 (1989); Thomas J. Reed, *Admitting the Accused's Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201 (2005); David A. Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts*, 45 CREIGHTON L. REV. 215 (2011); H. Richard Uviller, *Evidence of*

issue whether the criminal defendant's past crimes or other prior bad acts are admissible is subject to a formalized process heavy on procedure and ritualistic phrases yet almost totally detached from any articulable goal or justification. As a result, the character rule is steadily losing ground and is perhaps on its way to disappearing.

This Article offers an explanation for why the current character rule is so feckless. The thesis is that the dominant contemporary justification of the character rule and the tools for applying it lead the rule into a losing battle with prosecutors and others who argue for the admission of all relevant evidence in the search for truth. The character rule is better served by describing its justification in moral rather than epistemic terms and applying it accordingly. This Article will limit its focus to the most critical and problematic part of the character rule—the admission of the criminal defendant's past crimes and other acts under rule 404(b).[4]

The character rule appeared in English courts during the Restoration Period and around the same time as the hearsay rule.[5] The traditional common law rule prohibited use of the accused's bad character or prior, unrelated misconduct to suggest that he or she therefore was more likely guilty of the crime charged.[6] Today, however, if the accused's prior crime or other act is relevant for some purpose other than proving that the act is in conformity with the accused's character, it is admissible,[7] subject to a balancing

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Character To Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom, 130 U. PA. L. REV. 845 (1982).

[4] Rule 404(b) addresses so-called "extrinsic" crimes or acts. *See* FED. R. EVID. advisory committee's note. The admission of other crimes and acts that are "intrinsic" or "inextricably intertwined" with the charged offense also presents serious problems in theory and application; *see* United States v. Green, 617 F.3d 233, 246–48 (3d Cir. 2010) (the concept "creates confusion because, quite simply, no one knows what it means . . . . Like its predecessor res gestae, the inextricably intertwined test is vague, overbroad, and prone to abuse . . . .").

[5] WIGMORE ON EVIDENCE, *supra* note 3, § 58.2.

[6] The Continental tradition never adopted such a rule, and character evidence, including specific uncharged acts of the defendant, are admitted and given weight in criminal trials. *Id*. § 58.1; *see also* Mirjan R. Damaska, *Propensity Evidence in Continental Legal Systems*, 70 CHI-KENT L. REV. 55 (1994) (citing the "pervasive continental distaste" for rules that call for "advance assessment of the probative effect of evidence").

[7] FED. R. EVID. 404(b).

test.[8] Similar in form to the hearsay rule, the modern character rule defines a broad class of evidence, identifies a prohibited use of that evidence, but allows the evidence if offered for some other, relevant purpose.

The prohibited use of character evidence, often called the "propensity inference,"[9] is to suggest that because the accused has a particular character trait he or she probably acted in conformity with that trait at the time in question and therefore probably committed the crime charged. For example, imagine that the accused is charged with selling cocaine and has a prior conviction for selling marijuana. From the prior conviction, the jury might infer that the defendant has a propensity to do something that most people will not do—sell illegal drugs. The jury may further infer that he or she was acting in conformity with that propensity at the time in question. The character rule tells us that if this is the only use the jury can make of the evidence of the defendant's prior marijuana conviction, then it is inadmissible character evidence. But if there are other relevant uses of the prior conviction, such as proving motive, knowledge, intent, identity, plan, absence of mistake or accident, etc., then the prior conviction is admissible, though the defendant can request a limiting instruction.

The history of the "other uses" exception, currently known as Rule 404(b), is one of inexorable expansion, ultimately swallowing all but remnants of the prohibition against character evidence.[10]

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[8] *See, e.g.*, United States v. Edouard, 485 F.3d 1324, 1344 (11th Cir. 2007) ("[T]he probative value of the evidence cannot be substantially outweighed by undue prejudice . . . ."); *see also* Huddleston v. United States, 485 U.S. 681, 691 (1988) (noting that trial court must determine under Rule 403 whether probative value of similar-acts evidence is substantially outweighed by its potential for unfair prejudice); MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 404.5, n.55 (5th ed. 2001).

[9] *See* Smith v. State, 501 S.E.2d 523, 525 (Ga. Ct. App. 1998) ("The primary aim of . . . [the character] rule is to avoid the forbidden inference of propensity."); MCCORMICK ON EVIDENCE § 190 (Kenneth S. Brown ed., 2006) (explaining prohibition on character evidence for purpose of inviting propensity inference); WIGMORE ON EVIDENCE, *supra* note 3, § 55.1.

[10] This expansion is illustrated by the following Georgia cases. In *Bacon v. State*, 71 S.E.2d 615, 617–18 (Ga. 1952), a unanimous court, still attentive to the character rule, reversed the defendant's burglary conviction because the prosecution had been allowed to present evidence of six prior burglaries by the defendant to prove his intent. In the 1970s,

With the prosecution carrying the burden of proof beyond a reasonable doubt on every element of the crime charged, there are many opportunities for the prosecution to argue "other uses" and evidence that reveals the defendant's criminal past is frequently admitted.[11]

In sum, the character rule has become porous with exceptions and unpredictable in application. Although the rule still keeps out completely unrelated evidence of an accused's bad character, the many broad exceptions have reduced what is "completely unrelated" to a small and shrinking subset of the whole. The character rule has been engaged in a losing battle. It lacks a

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courts were still struggling with the scope of the exceptions to the rule. In *Hunt v. State*, 211 S.E.2d 288, 289–90 (Ga. 1974), a closely divided court affirmed the admission of evidence in a rape case that the accused had previously, as in this case, "picked up" a victim, taken her to the Boys Home in which he was raised, and raped her. In *Hamilton v. State*, 235 S.E.2d 515, 517–18 (Ga. 1977), the court majority called the question "close" whether to admit, in a home invasion/robbery case, three other similar home invasions/robberies committed by the defendant. The dissent called this a further liberalization of an already overextended rule and questioned the majority's commitment to the character rule: "If this is to be the new rule, why not just say, boldly and plainly, that the barrier has been lifted and defendants will now be tried on their record irrespective of any connection with the alleged crime on trial?" *Id.* at 518 (Ingram, J., dissenting). In *Sweeny v. State*, 264 S.E.2d 260, 261 (Ga. Ct. App. 1979), the Georgia Court of Appeals still could state that admission of defendant's other crimes, wrongs, or acts "more often than not . . . constitutes reversible error." Compare *McCord v. State*, 491 S.E.2d 360 (Ga. 1997). There, the prosecution claimed that the accused and his friends sought out the victim, picked a fight with him, and the accused shot him. The accused's prior conviction for aggravated assault was admitted because, although it was "not identical" to the charged offense, it "was relevant to show his propensity for using weapons to escalate a confrontation which he had precipitated." *Id.* at 361. As pointed out by a subsequent court, to read *McCord* broadly "would mean that the exception would have completely swallowed the [character] rule." King v. State, 496 S.E.2d 312, 314 (Ga. Ct. App. 1998). In *Standfill v. State*, 600 S.E.2d 695, 698 (Ga. Ct. App. 2004), a burglary case, the defendant's prior burglary was admitted for its similarities in that both burglaries were of a business, in the pre-dawn hours, and entry was made by breaking a window. In *Tatum v. State*, 677 S.E.2d 740, 742 (Ga. Ct. App. 2009), a prior assault was admitted to prove identity, even though the court admitted that the two assaults were not identical and shared only that the defendant used a weapon to escalate a confrontation. *See also* Leonard, *supra* note 3, at 1179 (describing courts' expansive allowance of character evidence when there is only a "dubious" distinction between purported noncharacter use and forbidden character inference); Sonenshein, *supra* note 3, at 242 (observing "general pattern" of courts expanding interpretations of Rule 404(b)).

[11] *See* Morris, *supra* note 3, at 184 ("[C]ourts routinely admit bad acts evidence precisely for its relevance to defendant propensity.").

simple and powerful message that clearly defines its purpose and helps to defend its turf against political pressure to diminish it.[12] The stakes for the prosecution and the defense are enormous. Once the jury learns that the defendant has a criminal past, the odds of conviction skyrocket.[13]

II. WHY HAS THE CHARACTER RULE DEGRADED?

Given that evidence of the accused's past crimes and wrongs is a powerful lubricant for conviction, prosecutors naturally seek to find ways around the rule barring such evidence.[14] Whether a rule can withstand such pressure depends upon two interrelated factors: (1) a clear and persuasive justification for the rule; and (2) clear and workable guidelines for applying the rule. The modern form of the character rule lacks both of these qualities.

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[12] *See* Leonard, *supra* note 3, at 1163 ("In a social climate of ever-growing fear of crime, it would not be surprising to see serious efforts to do away with the character prohibition altogether."); *see also* United States v. Queen, 132 F.3d 991, 995 (4th Cir. 1997) (stating that character rule cases "appear to lack consistency, perhaps because the rule's underlying principles are so elusive").

[13] *See* United States v. Burkhart, 458 F.2d 201, 204 (10th Cir. 1972) ("[A]n obvious truth is that once prior convictions are introduced the trial is, for all practical purposes, completed and the guilty outcome follows as a mere formality."); State v. Saunders, 12 P. 441, 445 (Or. 1886) ("Place a person on trial upon a criminal charge, and allow the prosecution to show . . . that he has before been implicated in similar affairs, no matter what explanation of them he attempts to make, it will be more damaging evidence against him . . . than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials know this . . . ."); *see also* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 389–96 (2d ed. 1971) (discussing empirical studies); Kuhns, *supra* note 3, at 777 ("Other acts evidence may have a prejudicial impact on the factfinder."); Michael J. Saks & Roselle L. Wissler, *On the Inefficacy of Limiting Instructions: When Jurors Use Prior Conviction Evidence To Decide on Guilt*, 9 LAW & HUM. BEHAV. 37, 38 (1985) (citing concerns that jurors don't understand limiting instructions and consider prior bad acts evidence for propensity purposes); Lee E. Teitelbaum et al., *Evaluating the Prejudicial Effect of Evidence: Can Judges Identify the Impact of Improper Evidence on Juries?*, 1983 WIS. L. REV. 1147, 1150 (discussing judgments jurors form about defendants based on their prior behavior).

[14] *See* Rivers v. State, 513 S.E.2d 263, 266 (Ga. Ct. App. 1999) ("Because of the potency of similar transaction evidence in criminal prosecutions, the state understandably seeks to introduce it whenever it can.").

A. JUSTIFICATIONS FOR THE RULE

A rule that bars powerful prosecution evidence needs to justify itself over and over again. Every time a trial judge, an appellate court, or a legislature considers the application of the character rule, the rule will lose ground unless its justification is clear and strong. There are numerous justifications for the character rule, and some are weaker than others. Unfortunately for the rule's vitality, one of the weakest justifications attained the most prominence and shaped the form and application of the modern rule.

Wigmore discusses several justifications for the rule.[15] One is a practical issue: surprise. If any and all of the defendant's personal history and past conduct were admissible, defense counsel would have to prepare to defend the accused's whole life. Absent such thorough preparation, the defense would be frequently surprised and unprepared to respond to the bits and pieces of the defendant's past that the prosecution chose to offer into evidence. The surprise issue has been diffused in most trial courts by rules requiring notice of the specific other crimes or acts of the accused that the prosecution intends to offer at trial.[16]

Wigmore also discusses the concern that evidence of the defendant's bad character may lead a jury to convict for past actions rather than for the crimes charged. But this fear of illegitimate conviction comes into play only when the nature of the character evidence is so bad that the jury will no longer much care whether the crime charged was sufficiently proved and is simply anxious to get the defendant off the streets or to punish him or her for socially despised conduct or associations.[17] Most character evidence does not pose such a severe threat; thus, this justification, while quite powerful in the appropriate case, is too narrow to support the much broader rule excluding all evidence of

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[15] *See generally* WIGMORE ON EVIDENCE, *supra* note 3, §§ 53–57, 216.

[16] *See, e.g.*, FED. R. EVID. 404(b)(2)(A), (B) (requiring prosecutor to provide notice of other acts evidence).

[17] *See* Old Chief v. United States, 519 U.S. 172, 181 (1997) (citing the "risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment").

the accused's bad character to prove he or she acted in conformity. The justification for this broader application of the rule is the overvaluation argument.

The overvaluation argument claims that jurors give too much weight to character evidence.[18] Jurors allegedly are too quick to infer the defendant's character or propensity based on prior convictions or other bad acts, and they exaggerate the probability that the defendant acted in conformity with this propensity at the time in question.[19]

There is no doubting the general proposition that once the jury learns that the accused has a criminal past, the odds of conviction increase significantly.[20] The overvaluation argument claims that this significant increase in the conviction rate is not due to the actual probative value of bad character evidence as proof of guilt; therefore, the jury must give too much weight to the evidence, specifically to the propensity inference.

There are several basic problems with the overvaluation argument. First, the assertion that jurors give "too much" weight to certain evidence rather arrogantly suggests that lawyers and judges know better than jurors how much weight such evidence should get. But what logical or other weaknesses of "propensity

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[18] WIGMORE ON EVIDENCE, *supra* note 3, § 58.2 (citing "the overstrong tendency to believe the accused guilty of the charge merely because he is a likely person to do such acts" and observing how "it is said that such evidence would be given greater probative value than it deserves, and so lead to convictions on insufficient evidence"); *see also* Michelson v. United States, 335 U.S. 469, 475–76 (1948) ("The inquiry [into the accused's character] is not rejected because [it] is irrelevant; on the contrary, it is said to weigh too much with the jury . . . ."); Cardell v. State, 168 S.E.2d 889, 891 (Ga. Ct. App. 1969) ("It goes without saying that testimony that the defendant has engaged in other criminal transactions is prejudicial to him in the case for which he is on trial, not because it has no probative value but because it has too much, as tending to indicate that he is of a criminal bent of mind and therefore more likely than the average citizen to have committed the act of which he is accused.").

[19] *See* Imwinkelried, *supra* note 3, at 582 ("[J]urors may give character far more weight than it deserves."); Mendez, *supra* note 3, at 881–83 (jurors give character evidence "undeserved weight"); Roger C. Park, *Character at the Crossroads*, 49 HASTINGS L.J. 717, 720 (1998) (referring to the problem of overevaluation as one of "inferential error"); Glen Weissenberger, *Making Sense of Extrinsic Act Evidence: Federal Rule of Evidence 404(b)*, 70 IOWA L. REV. 579, 602 (1985) (referring to the problem of jurors giving character evidence "more weight than it deserves" as an "estimation" error).

[20] Rivers v. State, 513 S.E.2d 263, 266 (Ga. Ct. App. 1999).

evidence" do lawyers and judges see that jurors cannot? Are the weaknesses so arcane that they cannot even be explained to the jury in closing argument? Would jurors really have to attend law school and try a few criminal cases before they could see and appreciate the "proper" probative value of character evidence?[21]

Moreover, 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. Such a speculative equation (that the loss of accuracy from overvaluing character evidence is greater than the loss of accuracy from excluding it) is hardly a satisfactory justification for a categorical rule of exclusion.

Social scientists have weighed in with their theories and studies, often conflicting, on how jurors use character evidence.[22] Social science research is useful in exploring the limitations of predicting behavior based solely on character traits, but this is not what a jury is asked to do, particularly in close cases.[23] Mock jury studies and similar testing in artificial environments are missing the critical emotional elements that real jurors must face in real cases.[24] Which leads to a second problem with the overvaluation thesis. It feeds a reductionist view of jury deliberation in which jurors behave something like smart adding machines, assigning probative values to evidence of guilt and innocence and ultimately

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[21] Kuhns, *supra* note 3, at 778, n.4.

[22] *See generally* Davies, *supra* note 3, at 504; Edward J. Imwinkelried, *Reshaping the "Grotesque" Doctrine of Character Evidence: The Reform Implications of the Most Recent Psychological Research*, 36 SW. U. L. REV. 741 (2008); Robert G. Lawson, *Credibility and Character: A Different Look at an Interminable Problem*, 50 NOTRE DAME L. REV. 758, 789 (1975); Miguel A. Méndez, *California's New Law on Character Evidence: The Impact of Recent Psychological Studies*, 31 UCLA L. REV. 1003, 1044–59 (1984); Park, *supra* note 19, at 728–40; Sonenshein, *supra* note 3, at 274–75; Teitelbaum et al., *supra* note 13, at 1147.

[23] *See* Davies, *supra* note 3, at 533 ("[T]he notion that jurors overvalue the probativeness of character or make errors because of their inability to make accurate assessments of character gains little reinforcement from contemporary work in the social sciences.").

[24] *See* David C. Funder, *Errors and Mistakes: Evaluating the Accuracy of Social Judgment*, 101 PSYCHOL. BULL. 75, 84 (1987) (discussing the problem of extrapolating from controlled laboratory studies of attribution error to the real world).

tallying up the values to arrive at their approximation of truth. In the case of character evidence, according to the overvaluation thesis, the numbers don't add up right. "One pound" of probative value from character evidence somehow ends up as "two pounds" in the jury room. But the effect that any piece of evidence has on a juror's decisionmaking may be due as much to context as to its rational probative value.

For example, suppose that cross-examination of the prosecution's key forensic expert in a murder case reveals that the expert lazily overlooked some routine steps in performing a certain lab test in this case but that those omissions in no way directly affected the accuracy or integrity of the lab results. The propensity inference here (laziness on these procedures, so probably was lazy on other, more important ones) has weak probative value. Yet we should hesitate to say that a jury is acting irrationally or illegitimately if it rejects the expert's credibility. The state must earn the trust and confidence of the jury, and, in this context, even a weak propensity inference can have a dispositive effect. This is not the result of the jury overvaluing the evidence but of using the evidence on more than one issue. There is the simple use of the evidence as weak proof that the expert made other, critical mistakes in this case. There is also the issue of what quality of evidence the jury will demand from the prosecution's experts, what attitude the jury should take toward a state agent who may not take the care in his or her duties that the jury would expect and demand.

Moreover, reducing the "problem" with character evidence to juror overvaluation of certain inferences tends to trivialize the character rule and invite the perspective that the ills of character evidence can be cured by instructing the jury and warning them away from the troublesome inferences. In this approach, the character rule is all about improving accuracy. Certainly accuracy is an important goal in a criminal trial, but there are also moral and political dimensions to a criminal trial by jury that we must consider when evaluating the character rule.[25]

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[25] *See* Chris William Sanchirico, *Character Evidence and the Object of Trial*, 101 COLUM. L. REV. 1227 (2001); Weissenberger, *supra* note 19, at 579.

B. THE PROPENSITY INFERENCE

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.[26] Judges are taught that propensity inferences occupy the illegitimate, prejudicial side of the balancing scale, while relevant, nonpropensity uses of character evidence are legitimate. In practice, however, the propensity inference is an unreliable proxy for undesirable character evidence, and efforts to faithfully apply the propensity rule often lead to confusion and frustration.[27]

If the propensity inference were a true and reliable proxy for the problems of character evidence, we should expect two things: (1) the absence of the propensity inference should assure us that there are no character evidence problems; and (2) when the relevance of evidence relies exclusively on propensity inferences based on character, the evidence would be excluded. Unfortunately, the current formulation of the character rule, so heavily based on the prohibition of the propensity inference, fails both expectations.

For example, consider the case of a defendant charged with murder. The prosecution offers evidence that the victim was a child who had previously accused the defendant of molestation, though the defendant was never charged. Although there are no clear propensity uses of this evidence regarding the defendant, it still presents two classic problems with character evidence. First, the alleged molestation will divert the trial and jury's attention, and the accused may therefore have to defend against both the murder charge and the uncharged molestation. Second, apart from any propensity inference, jurors do not like child molesters and are unlikely to extend the presumption of innocence as vigorously to such a person as they would to others. A character

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[26] *See, e.g.*, Old Chief v. United States, 519 U.S. 172, 182 (1997) ("There is no question that propensity would be an improper basis for conviction.").

[27] Kuhns, *supra* note 3, at 781 ("[T]he concept of 'propensity inference' does not provide a viable basis for distinguishing between admissible and inadmissible specific acts evidence . . . .").

rule built entirely around the prohibition of propensity inferences, however, does not address these problems.[28]

More importantly, the distinction between legitimate "propensity free" inferences from character evidence and disfavored propensity uses is far from clear and is difficult to apply. Many of Rule 404(b)'s admissible uses of character evidence are more or less dependent on propensity inferences. The state of mind exceptions (motive, intent, plan), for example, often involve propensity inferences to one degree or another and sometimes these inferences are necessarily based on the defendant's character. For example, assume Joe is charged with murdering Fred. The prosecution offers evidence that the defendant Joe is a leader of a criminal organization that Fred quit just before he was killed. This evidence clearly is admissible under Rule 404(b) to establish motive, yet it just as clearly carries a propensity inference—from the fact that Joe leads a criminal organization, we infer his character for violence, and from that character trait, we infer his propensity to handle the problem of a subordinate's defection violently. Without this propensity inference, the evidence does not show motive. If we changed the facts to make Joe the leader of a Boy Scout troop that Fred left, the propensity inference disappears and takes the motive relevance with it.

The 404(b) exception for proving intent poses similar difficulties. For example, to prove that the defendant intended to sell the drugs found in his or her possession, the prosecution offers evidence that the defendant sold drugs in the past. Although courts almost routinely admit the prior drug sale for this purpose,[29] it is hard to see how this use avoids the propensity inference from character; namely, that a person with a history of

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[28] I am not suggesting that the evidence should be inadmissible, only that the negative effects of this evidence have nothing to do with a propensity inference.

[29] *See, e.g.*, United States v. Brown, 587 F.3d 1082, 1091 (11th Cir. 2009) ("Prior convictions for drug trafficking are considered highly probative of intent to commit current drug trafficking offenses, and thus were properly admitted."); United States v. Crowder, 141 F.3d 1202, 1208 (D.C. Cir. 1998) ("Crowder's other offense was thus probative of several matters 'of consequence' at trial" and was thus admissible under Rule 404(b).).

selling drugs has a propensity to sell drugs and that is therefore what the defendant intended to do with the drugs in this case.[30]

Of course, not all evidence admitted under 404(b) is offered for a propensity inference based on the defendant's character. The problem is that the putative tools for distinguishing between prohibited character evidence and admissible evidence under 404(b) simply will not reliably guide the trial judge to any result but confusion. Not surprisingly, most courts avoid all but general references to the propensity use of character evidence and rarely grapple with this central feature of the rule.

One obvious pattern in the cases applying Rule 404(b) is that the more closely the prior crime or act relates to some issue in the case, the greater the likelihood of its admission. Courts are guided far more by whether the prosecution can fit the relevance of the accused's prior crime into one of the 404(b) pigeonholes than any

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[30] In one of the most influential cases on Rule 404(b), *United States v. Beechum*, the defendant postal worker was charged with stealing a coin from the mail. 582 F.2d 898, 908 (5th Cir. 1978) (en banc). He claimed the coin had fallen out of its packaging, and he was on his way to turn it over to his supervisor when he was arrested. The majority in *Beechum* upheld the admission of the defendant's possession of two stolen credit cards to prove his intent to steal the coin. *Id.* at 918. As the dissent wrote, use of this uncharged criminal conduct to prove intent clearly uses the propensity inference.

> Thus the majority thinks the rule unequivocally allows us to reason that because a defendant displayed an improper intent in the past, he is more likely to have had an evil intent in the act for which he is tried. How this differs from reasoning that the defendant has a "propensity" to act with evil intent is beyond reason; but the majority says the rule prohibits references based on propensity. There simply are no such watertight compartments to be found, unless we engage in subtle and sophisticated metaphysical analysis.

Id. at 920 (Goldberg, J., dissenting) (internal citations omitted); *see also* United States v. Matthews, 431 F.3d 1296, 1313 n.1 (11th Cir. 2005) (Tjoflat, J., concurring) ("[T]he line between evidence admitted to demonstrate intent and evidence admitted to demonstrate propensity is hardly clear. It is difficult to argue that a person had an intention to do something on a particular occasion because he or she demonstrated that intention previously without implicitly suggesting that the person has a proclivity towards that intent. . . . If the inferential chain must run through the defendant's character—and his or her predisposition towards a criminal intent—the evidence is squarely on the propensity side of the elusive line."); Ordover, *supra* note 3, at 157 ("Though an inference of general intent from the prior crime to the offense charged can be made, such an inference is based upon propensity, which is precisely the reasoning that is condemned by the statute and its philosophical underpinnings.").

analysis of propensity versus nonpropensity.[31] This rather mechanistic approach is guided mostly by fact-specific case law rather than analysis using the rule's tools.[32] If a defendant is charged with drug dealing and has a prior conviction for selling drugs, the trial court typically will allow it if the case is substantially similar to other cases in which such evidence was admitted and upheld by an appellate court using an abuse of discretion standard of review.[33]

The failure of the propensity inference as a tool for identifying admissible and inadmissible character evidence has placed pressure on two backups for controlling the use of character evidence: judicial balancing and limiting instructions. Neither has done well.

Under Rule 403 balancing, the trial court is supposed to identify the legitimate probative value of the evidence and weigh it against the unfair prejudicial effect, but this invites the question: what are "legitimate" and "illegitimate" influences on the jury?[34] Returning to an earlier example, if the prosecution offers as evidence of motive the fact that the murder victim recently tried to quit a criminal gang led by the defendant, the trial court is supposed to differentiate the legitimate from illegitimate uses of this evidence. But as discussed above, the propensity inference is not a reliable proxy for illegitimate uses of character evidence. As

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[31] *See* Edwards v. State, 422 S.E.2d 424, 425 (Ga. 1992) (Fletcher, J., concurring) ("Those basic words, [motive, plan, scheme etc.,] in numerous variations, are being used like some magic litany to justify the introduction of independent act evidence in case after case that comes before this court. However, there is nothing magic about those words and their use is no substitute for the requisite analysis that this type of evidence must undergo before it may be introduced . . . .").

[32] *See* State v. Hinson, 506 S.E.2d 870, 871 (Ga. 1998) (Fletcher, J., dissenting) ("Appellate decisions in recent decades and the issues presented in countless cases confirm that all too often neither the courts nor the parties understand the analysis required to properly determine whether such evidence should be admitted: Is it logically relevant to prove a material issue in dispute or is it really a pretense for the admission of evidence that the defendant has the propensity to commit the crime with which he is charged?").

[33] The trial court's rulings on 404(b) evidence are reviewed only for a "clear abuse of discretion." United States v. McNair, 605 F.3d 1152, n.69 (11th Cir. 2010).

[34] *See* Weissenberger, *supra* note 19, at 601 ("After all, if those who have devoted substantial intellectual energy to the question cannot agree, how can jurists be expected to attain confidence-inspiring consistency?").

a consequence, what is "legitimate" is whatever the prosecutor can connect to the specific exceptions in 404(b), no matter how insecurely, and "illegitimate" means that which has absolutely no connection to the crime charged other than the suggestion that the defendant is a bad person. Not surprisingly, this rather diluted and vague expression of the illegitimate use of character evidence fares poorly when balanced against specific 404(b) probative value, particularly when the balancing test is uneven—the evidence is excluded only if the illegitimate effects "substantially outweigh" the probative value.[35]

Finally, the overvaluation thesis has supported the routine use of limiting instructions to accompany the admission of evidence that has both legitimate and illegitimate uses. If the danger with character evidence is the jury's tendency to overvalue it as proof of the accused's propensity to commit the crime charged, then a careful limiting instruction should mitigate that jury tendency. But the typical limiting instruction offers nothing more than a confusing distinction between the proper and improper use of the evidence. For example, in our hypothetical trial regarding the murder of the defecting gang member, it is meaningless to instruct the jury to consider the defendant's leadership of a criminal gang for the limited purpose of evidence of motive but not to use it as evidence that the defendant probably acted in conformity with his violent character in this case. What could the jurors make of such an instruction? The defendant's motive to kill the victim is derived mostly from the nature of the defendant's role in the gang and character as a gang leader.[36]

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[35] FED. R. EVID. 403.

[36] *See, e.g.*, 2 COUNCIL OF SUPERIOR COURT JUDGES OF GA., SUGGESTED PATTERN JURY INSTRUCTIONS § 1.34.10 (4th ed. 2008) (explaining the limited permissible purposes for which other acts evidence may be considered and instructing jurors that "[s]uch evidence . . . may not be considered . . . for any other purpose"). Although Georgia's pattern instruction tells the juror that the use of the evidence is "limited," it does not explain any such limitation coherently. One has to wonder what the jurors make of an instruction to "determine whether the act or occurrence was sufficiently" connected to the crime charged "such that proof of the other acts or occurrences tends to prove the crime charged." *Id.*; *see* Harris v. State, 455 S.E.2d 387, 389 n.1 (Ga. Ct. App. 1995) (Beasley, J., concurring) ("The effect of the limited-purpose charge is problematic in itself, because of the unnatural compartmentalization of thinking which is required of the jurors. In a recent case before

In sum, an evidence rule's strength or weakness is ultimately decided in the trial and appellate courts by judges who have been educated and trained in the ways of the rule. A weak and confusing justification for the character rule, the overvaluation thesis, has shaped the form and application of the modern rule. It partnered with the confusing and unworkable distinction between propensity and nonpropensity uses of character evidence. It encouraged the delusion that limiting instructions can seriously diminish the problems with character evidence by addressing the jury's presumed cognitive difficulties with such evidence. But worst of all, the dominance of the overvaluation thesis has somewhat trivialized the character rule. There are no grand principles of liberty or justice at stake, or so it seems, but only a problem of potential juror miscalculation, a problem to be addressed by limiting instructions and trial court balancing. All this has made the character rule vulnerable to natural political pressures to evade it.

Any rule that impedes the prosecution of serious crimes will be subject to political pressure. How well the rule stands up to that pressure depends, in large part, on how well the rule expresses a favored policy choice. Although the character rule seems to invoke a number of popular political themes, it has been getting clobbered in our courts. This has been easy to accomplish where the rule poorly constrains and so much is left to the barely controlled discretion of the trial judge. Not surprisingly, courts have been particularly lenient in the admission of character evidence when the crime charged is the type to which the public has expressed particular anger or fear. While sex crimes are an obvious example, there are others. In Georgia, for example, the courts created an exception to the character rule in DUI cases such that any and all prior DUIs were admissible in a DUI case to prove "bent of mind,"

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us, the transcript shows that after the trial court gave the limited-purpose charge with respect to evidence of other offenses, the court asked the jury, 'Do you understand, ladies and gentlemen, what I just got through saying or is it Greek to you?' The transcript reveals: 'Whereupon, a juror states it's Greek.' "); s*ee also* Park, *supra* note 19, at 755 (referencing "unintelligible limiting instructions"); Saks & Wissler, *supra* note 13, at 37 (indicating that "limiting instructions do not counteract the admission of [prior] convictions").

or "course of conduct."[37] The "war on drugs" likewise has resulted in a relaxation of the character rule in Georgia.[38]

Yet as weak as the character rule is, there is no apparent political will to simply abolish it altogether and adopt the Continental view, admitting character evidence whenever it is relevant. Perhaps this is because the nature of the rule still resonates morally and politically—at least in its simplest form. The idea that American justice should focus on whether the defendant committed the acts charged rather than whether he or she is the kind of person who could or would commit such acts is most appealing. The devil is in the details.

III. REVIVING THE CHARACTER RULE

The character rule has been poorly served by a justification that focuses on valuation error and application tools that revolve around the propensity inference. This does not mean, however, that our concerns about character evidence are misplaced—only that they are misdescribed.

Many courts and scholars have noted the relationship of the character rule to the presumption of innocence and the reasonable doubt standard.[39] In contrast to the overvaluation thesis that implicitly assumes a static threshold for conviction, a more useful account of juror reaction to character evidence focuses on the effect

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[37] *See, e.g.*, Fields v. State, 479 S.E.2d 393, 396 (Ga. Ct. App. 1996) ("Evidence of a prior DUI offense, regardless of the circumstances surrounding its commission, is logically connected with a pending DUI charge as it is relevant to establish that the perpetrator has the bent of mind to get behind the wheel of a vehicle when it's less safe for him to do so.").

[38] *See, e.g.*, Tate v. State, 495 S.E.2d 658, 661 (Ga. Ct. App. 1998) (affirming admission of defendant's nine-year-old guilty plea to selling cocaine "within a few blocks" of traffic stop at issue in order to show identity (though that was not in issue), as well as "motive, intent, and knowledge").

[39] *See, e.g.*, Spencer v. Texas, 385 U.S. 554, 575 (1967) ("Evidence of prior convictions has been forbidden because it jeopardizes the presumption of innocence of the crime currently charged."); United States v. Daniels, 770 F.2d 1111, 1118 (D.C. Cir. 1985) ("[The character rule] . . . gives meaning to the central precept of our system of criminal justice, the presumption of innocence."); United States v. Myers, 550 F.2d 1036, 1044 (5th Cir. 1977) ("A concomitant of the presumption of innocence is that a defendant must be tried for what he did, not for who he is.").

of that evidence on the jurors' own sense of what is "enough" evidence to convict the defendant.

Jurors bring with them to trial a natural fear of wrongfully convicting a person as well as a fear of wrongful acquittal. The fear of wrongful conviction is no doubt greatest when the jurors identify with the defendant, when the defendant appears to be an ordinary, law abiding citizen, just like the jurors. "There but for the grace of God, go I."[40] The jurors can imagine themselves wrongfully arrested, indicted, and forced to face trial and the horrible prospect of prison. Jurors in such a state of mind will closely scrutinize the prosecution's evidence and give that defendant every possible benefit of the doubt.

The law not only tolerates this juror skepticism, it legitimizes and encourages it with instructions that tell jurors to presume the innocence of the defendant and to acquit if they have any reasonable doubts as to guilt. At one time, the standard of proof in criminal cases was commonly called a "moral certainty" of guilt.[41] Presumably, such language was not scientific enough to thrive in the twentieth century, but the expression speaks more pertinently than does the reasonable doubt language to some situations in which jurors find themselves. We are only concerned here with close cases. When the prosecution has ample evidence of the defendant's guilt, and the defense has only incredible denials, the role of character evidence or its effect on the jury is inconsequential. In close cases, however, where reasonable people can and do differ on the evidence of guilt, the choice to vote for conviction or acquittal becomes, in the end, a moral more than an epistemic decision.

Close cases, by definition, require jurors to confront the limits of their knowledge. Sometimes, initial doubts or concerns are clarified by discussion, providing sufficient epistemic confidence for the jury to decide. This, indeed, is the goal of instructing the

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[40] Allegedly based on a mid-sixteenth century statement by John Bradford, "There but for the grace of God, goes John Bradford," said while held in the Tower of London on seeing a group of criminals being led to their execution. ELIZABETH KNOWLES, OXFORD DICTIONARY OF QUOTATIONS 154 (7th ed. 2009).

[41] Victor v. Nebraska, 511 U.S. 1, 10–12 (1994).

jurors to focus on "reasonable" doubts. But what is reasonable to one is not so reasonable to another, leaving us with those close cases in which the jurors know all they are going to know about what happened. They know that they are never going to know what happened with absolute certainty, and they have to decide whether they know "enough" to convict.

It is here that the full weight of the moral responsibility placed on jurors comes into play. Knowing the consequences for the defendant, each juror must make a moral decision: "Ought I convict and thereby allow the state to punish this person?" The law can reassure the jurors that their duty is satisfied if they follow the court's instructions, but it is the jurors who must live with their decisions.

The juror's struggle in close cases is between the fear of doing a great injustice (wrongful conviction) and failure to obey the law's (moral) command to convict the guilty (wrongful acquittal), thereby disserving the current victim and possible future victims. The effect of evidence of the defendant's past crimes on this struggle is, not surprisingly, quite substantial. Once the jurors learn that the defendant is not one of them—not like their neighbors, co-workers, or family, not potential innocents caught up in the scary criminal justice system—but is one of "them"—criminals with scant regard for the law—the fear of wrongful conviction dissipates as the fear of wrongful acquittal grows.

In the latter situation, the jurors' fear of wrongful conviction shrinks for several reasons. First, there is the good old propensity inference that, while not "overvalued," does suggest a greater probability than not that a defendant was engaged (again) in criminal activity. This adds to the jurors' epistemic confidence in their verdict. Likewise, to the extent that jurors have doubts as to whether the defendant is morally or emotionally capable of committing a particular crime, evidence of the defendant's past crimes may answer those doubts. Finally, and most importantly, there is simply less fear that getting it wrong would be a great injustice, both because the defendant has probably gotten away with other crimes in the past and because this is not a situation in

which an innocent, nice person is going to have his or her life ruined by the jury's mistake.

Evidence that the defendant has a criminal past also amplifies the jurors' fears of wrongful acquittal. A wrongful acquittal not only fails to do justice for the victim in the case on trial, it also lets a person with a criminal history loose on society to commit more crimes and create more victims.

In sum, the expression "presumption of innocence" is not some abstract legal construct. It would mean nothing if it did not resonate, as it does, with the jurors' natural approach to their serious task. When the jurors believe that the accused is like them, they extend the presumption of innocence and burden of proof to their fullest limits and are on guard against wrongful conviction. But when they learn that the defendant is not like them but is a criminal or other serious social deviant, the jurors relax their guard, and while they may appreciate and still apply the admonition that the prosecution must tie the defendant to the specific crime charged, the amount of evidence that is "enough" to convict will simply not be as high.[42]

The character rule is not needed to maintain the presumption of innocence when the defendant is a law-abiding citizen the jurors would naturally seek to protect from the enormous but fallible power of the state. Indeed, the rules permit such defendants to present evidence of their good character to ensure that they get the full presumption of innocence.[43]

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[42] *See* Boyd v. United States, 142 U.S. 450, 458 (1892) ("Proof of . . . [defendants' prior crimes] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime . . . ."); Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 FORDHAM URB. L.J. 271, 274 (1995) ("Opponents of the use of propensity evidence fear that it will have the practical effect of changing the burden of proof. The jurors may think, 'Now that we know what else this guy did, we're not going to worry as much as Blackstone would about convicting an innocent man. Sure, it's better to let ten guilty men go free than to convict an innocent man in the case where the man's really completely innocent. But here, he's not completely innocent . . . .' " (footnote omitted)).

[43] FED. R. EVID. 404(a).

But why should we endeavor to preserve the presumption of innocence for a defendant with a criminal past? There is nothing necessarily irrational about a system that adjusts the standard of proof required for conviction according to the accused's criminal record. Such a system might be more efficient if viewed solely in terms of yielding accurate results. Yet when our system proudly claims that it is better that ten guilty go free than one innocent be wrongfully convicted,[44] it admits to sacrificing one kind of accuracy (in acquittals), in order to avoid another kind of inaccuracy (in convictions). These are not issues of efficiency or even rationality but of policy.

Our democratic instincts suggest that we should treat all criminal defendants the same, regardless of their pasts. But even our current rules suggest that we do not take this very seriously. After all, we allow defendants to present evidence of their own good character, to distinguish themselves from the usual scoundrels who are targets of the criminal justice system. Moreover, once defendants are convicted we admit evidence of their criminal history at sentencing, thereby treating them differently from convicted defendants with no past crimes.[45]

Nor is it helpful to claim some "right" of criminal defendants to be tried by a jury ignorant of their past misdeeds. One might just as well claim a countervailing right of the jury to know who they are judging. In close cases, particularly ones dealing with heinous crimes, jurors naturally wonder whether the defendant is morally and emotionally capable of committing acts that the jurors believe they themselves could never commit. Yet the character rule attempts to prohibit prosecution proof of that capability. If the rule succeeds, and no evidence of the defendant's past or character is admitted, how should the jury answer the moral capability issue? Should they extend the presumption of innocence to a presumption of a good, or at least "normal," character? This would

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[44] 4 WILLIAM BLACKSTONE, COMMENTARIES *358.

[45] *See* 18 U.S.C. § 3661 (1970) ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense" for the purpose of sentencing.); FED. R. EVID. § 1101(d) (providing that the Rules of Evidence, including those that prohibit character evidence, do not apply to sentencing).

give many defendants an undeserved but potentially potent benefit.[46]

So why do we (ought we) try to preserve the presumption of innocence for those with a criminal past? For two reasons: First, jurors are a major check against police and prosecutorial abuse, laziness, and incompetence. Anything that encourages the jury to scrutinize the prosecution's case carefully and skeptically likewise encourages the police and prosecution to rise to the task. To the extent that evidence of the accused's bad character makes it easier to convict, it is undesirable for police or prosecutors to factor that advantage into their decisions as to who and how to investigate, arrest, or prosecute.

Second, to the extent that dissipation of the presumption of innocence translates into reduced jury scrutiny and skepticism of prosecution evidence, introduction of evidence of past bad acts increases the odds of wrongful conviction—not because a juror may overvalue or misuse the evidence of the defendant's character but because the juror is less likely to err on the side of acquittal. This is the heart of the moral–political argument for the character rule: we want jurors, in all cases, to exercise the most heightened scrutiny of the state's evidence, to give the benefit of the doubt and then some to a fellow citizen who stands in jeopardy of tasting the state's awesome power to take away that citizen's liberty. The very idea that we neither need nor desire such a vigilant jury

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[46] For example, a defendant charged with a brutal rape manages to exclude all evidence of his past and character. The case is close, and many jurors doubt that the clean-cut, normal-looking defendant they saw in the courtroom could commit such horrible acts. If such doubts lead to acquittal, and the jurors later learn that the clean-cut defendant had a prior conviction for rape, the jurors would no doubt be outraged. The law allowed them to acquit the defendant based on a presumption the law knew to be false. As one juror said upon learning that a defendant she voted to acquit subsequently committed a brutal murder:

> I would never want to serve on a jury again. I'm not comfortable with the process, because I think jurors are shielded from information. If we're given enough credit and responsibility to decide the fate of another person, then why are we not given enough credit and responsibility to handle all the information?

Kevin Duffy, *Juror Regrets 1999 Acquittal of Ax Killer*, ATLANTA J.-CONST., Sept. 15, 2003, at D1.

when the defendant has a criminal history violates the most basic notions of equal protection.[47]

This is of course subject to the caveat: "whenever possible." There is no escaping the reality that evidence of the accused's past criminal acts is sometimes needed to address critical issues upon which the prosecution carries the burden of proof. Judges will not and should not deny the prosecution such evidence. But just because the character rule cannot protect the presumption of innocence in all cases does not mean it cannot do a much better job in most cases. The key is to reorient how we view the trial court's balancing of 404(b) evidence under Rule 403. As discussed above, trial courts currently exhibit little sense in their balancing of the costs of admitting the defendant's past crimes. Vague notions of jurors overvaluing character evidence or not convicting the defendant for past crimes provide a weak counterpoint on the balancing scale to the state's arguments for the specific relevance of the evidence under 404(b). Add the fact that Rule 403 excludes evidence only when the effect of the illegitimate use "substantially outweighs" the 404(b) relevance, and it is no surprise that the state's evidence nearly always survives the balancing test.

Instead, trial courts need to focus on the fact that the routine admission of evidence of the defendant's criminal past has a huge cost, not just in terms of the effects it might have on an individual defendant's chances of conviction, but, more importantly, on diminishing a very important safeguard in our system of criminal justice—the heightened scrutiny of a vigilant and skeptical jury. The court's balancing should focus on whether the need for Rule 404(b) evidence justifies its cost.[48] The burden should be on the government to establish this need as critical to its case.[49]

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[47] *See* People v. White, 24 Wend. 520, 574 (N.Y. 1840) ("The protection of the law is due alike to the righteous and unrighteous. The sun of justice shines alike for the evil and the good, the just and the unjust. Crime must be proved, not presumed; on the contrary, the most vicious is presumed innocent until proved guilty."). This justification also explains why we freely admit evidence of the defendant's past crimes and bad character at sentencing. Once the presumption of innocence is formally rebutted with a jury's verdict of guilty beyond a reasonable doubt, there is no further purpose in excluding character evidence.

[48] This reoriented balancing test should apply not only to 404(b) evidence but to any

There are several advantages to reorienting the trial court's balancing of 404(b) evidence in this way. First, as discussed above, it gives some gravitas to the opponent's side of the balancing. Instead of obscuring the cost of admitting character evidence in the fog of propensity and nonpropensity uses and juror overvaluation, the cost is cast in terms that judges recognize and (mostly) support. Second, the cost is viewed systemically rather than individually. Judges are people too, and the same reduction in the fear of wrongful conviction that affects jurors when they learn the defendant has a criminal past affects judges when they are asked to consider the "prejudicial effect" of the evidence on the defendant. Instead, the judge should look at the cost to our system of justice if the presumption of innocence is routinely trumped by even the weakest argument by the state for the admission of 404(b) evidence. In this way, the balancing is viewed not as a calculation of pluses and minuses for the defendant on trial (how we usually view balancing) but more as a protective requirement that the state justify the harm to the system.

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circumstances in which a defendant's other crimes or bad acts are offered into evidence, including so-called "intrinsic" or "inextricably intertwined" crimes as well as the use of prior convictions to impeach the testifying criminal defendant.

[49] Courts too often pay little attention to whether 404(b) evidence is truly needed to prove, for example, intent when intent is not actively at issue in the case. Some courts have held that merely pleading "not guilty" is enough to contest intent such that 404(b) evidence is admissible on that issue. *See, e.g.*, United States v. Brugman, 364 F.3d 613, 619 (5th Cir. 2004) (affirming admission of similar acts evidence to establish intent in case where defendant pled not guilty). Some courts have held that even if the defense offers to stipulate that it will not contest intent, 404(b) evidence still may be offered to prove intent and may pass muster under Rule 403. *See, e.g.*, United States v. Crowder, 141 F.3d 1202, 1203 (D.C. Cir. 1998) ("We now hold that despite a defendant's unequivocal offer to stipulate to an element of an offense, Rule 404(b) does not preclude the government from introducing evidence of other bad acts to prove that element."); *see also* United States v. Williams, 238 F.3d 871, 876 (7th Cir. 2001) ("[A] defendant's offer to stipulate to an element of an offense does not render inadmissible the prosecution's evidence of prior crimes to prove elements such as knowledge and intent."). *But see* United States v. Daraio, 445 F.3d 253, 265 (3d Cir. 2006) ("[C]ourts should generally deem prior bad acts evidence inadmissible to prove an issue that the defendant makes clear he is not contesting." (quoting United States v. Jemal, 26 F.3d 1267, 1274 (3d Cir. 1994))); United States v. Baker, 432 F.3d 1189, 1205 (11th Cir. 2005) ("[I]f intent is undisputed by the defendant, the evidence is of negligible probative weight compared to its inherent prejudice and is therefore uniformly inadmissible.").

Recasting the balancing test under Rule 404(b) certainly does not solve all the problems with the rule. The goal is much more modest—to give the rule at least a fighting chance when faced with weak or even bogus government arguments for the admission of 404(b) evidence to prove "intent," "plan," or similarly expansive issues.

There are two ways to encourage this different and more effective balancing test. First, we need to teach judges and lawyers that the character rule is not about improving accuracy or the search for truth but about protecting a critically important safeguard in our criminal justice system. We need to explain frankly that the character rule is supposed to help ensure a jury biased in favor of the defendant, even if that means that sometimes a guilty person will avoid conviction.

Second, Rule 404(b) should be rewritten to make it explicitly exclusionary—evidence of the defendant's past crimes and other bad acts and associations are *inadmissible* for any purpose unless the prosecution shows that the evidence is needed to address a real and important issue in the case. A stepped up balancing test in Rule 404(b) would require that the state's need for the evidence outweighs the policy that the presumption of innocence should remain intact whenever possible.

Finally, whenever such evidence survives the balancing and is admitted, instead of a confusing instruction that pretends to guide the jury in the proper logical use of the evidence, the instruction should remind the jury of the presumption of innocence—of how important it is to a free society and how they should work hard to give the defendant the same due that they would give members of their family or their good neighbors. This may not significantly mitigate the loss of the presumption of innocence,[50] but it is better than the head-scratching instructions we currently give.

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[50] *See* Government of the Virgin Islands v. Toto, 529 F.2d 278, 283 (3d Cir. 1976) (explaining that once the jury hears about the defendant's prior crime "it is most difficult, if not impossible, to assume continued integrity of the presumption of innocence. A drop of ink cannot be removed from a glass of milk.").